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IN THE

Supreme Court of the United States

OCTOBER TERM 1956

MINERAL HOLDING TRUST OF ST. PAUL, MINNESOTA, AND R. B. WHERRY AND C. A. GREEN,

Petitioners,

v.

ALUMINUM COMPANY OF AMERICA, CROWN CENTRAL PETROLEUM CORPORATION, ET AL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

JOHN E. DAUBNEY
Pioneer Bldg.
St. Paul, Minnesota

W. J. BARNES
415 Texas National Bank Bldg.
Houston 2, Texas

KNOX W. GILMORE
415 Texas National Bank Bldg.
Houston 2, Texas

JOHN W. STAYTON
Capitol National Bank Bldg.
Austin, Texas

JOYCE COX
2828 Gulf Bldg.
Houston 2, Texas

Attorneys for Petitioners,
Mineral Holding Trust,
R. B. Wherry and C. A. Green

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No.....

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MINERAL HOLDING TRUST OF ST. PAUL, MINNESOTA, AND R. B. WHERRY AND C. A. GREEN,

Petitioners,

v.

ALUMINUM COMPANY OF AMERICA, CROWN CENTRAL PETROLEUM CORPORATION, ET AL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

Petitioners pray that writ of certiorari issue to review the judgment of the Supreme Court of Texas entered in the above entitled cause on December 5, 1956.

OPINIONS BELOW

The trial court's unreported "Findings of Fact and Conclusions of Law" is reproduced in Appendix B at Page 61 *infra*. The opinion of the Court of Civil Appeals for the First Supreme Judicial District of Texas, 288 S.W. (2d) 819, is reproduced in Appendix B, Page 80, *infra*. The opinion of the Supreme Court of Texas pronounced December 5, 1956, with the dissent of three Justices, 299 S.W. (2d) 279 (not yet officially reported), is reproduced in Appendix B at Page 94 *infra*.

JURISDICTION

The judgment of the Texas Supreme Court was entered December 5, 1956; and that Court on March 27, 1957 overruled a motion for rehearing, timely filed. This Court's jurisdiction is invoked under Title 28 U.S.C. Sec. 1257(3), in that the case is one in which "title, right, privilege or immunity is specially set up or claimed under the Constitution * * * of the United States." Our specific claim is that our property has been destroyed, under and by the Supreme Court's opinion and order, without due process of law, in violation of the command and guarantee of the Fourteenth Amendment to the Constitution.

QUESTIONS PRESENTED.

We bring the question of whether the Supreme Court of Texas denied due process of law to Mineral Holding Trust of St. Paul, Minnesota, and its partial vendees, R. B. Wherry and C. A. Green, by reversing the Court of Civil Appeals and holding valid a judicial tax foreclosure sale of the Trust's Texas property (320 acres of mineral rights, to this time wholly undeveloped) when:

(a) The foreclosure proceeding was a private effort at destruction of the Trust's property by fraudulent imposition upon the Court's jurisdiction, upon the substantive and procedural laws of Texas and upon a non-resident property owner without notice.

(b) No taxes whatsoever had been assessed and no tax liens had been imposed upon the property of the Trust by the only processes established therefor by Texas law.

(c) Foreclosure jurisdiction was in the Texas foreclosing court only as respects lands "returned delinquent," that is, as respects lands on publicly filed delinquent tax rolls established by the following of detailed statutory procedure; and the land in question

never appeared on any such rolls (and the prescribed due course of the law to place them there had never been followed).

(d) The citation procedures mandatorily required by the Rules of the Supreme Court — the procedural law of Texas — were deliberately flaunted, a clumsy and fraudulent publication subterfuge substituted, and no notice or opportunity to be heard was in fact given to the non-resident owners in the tax foreclosure proceeding.

(e) The attack upon the foreclosure sale was a direct attack brought in the manner established by Texas law to attack any judicial action for lack of jurisdiction or fraud (a remedy that would have to be invented if it did not exist, for cases within the scope of the 14th Amendment and its counterparts in the Texas Constitution).

The Court will additionally and collaterally have to decide whether the Supreme Court of Texas denied due process of law in the following particulars:

(a) By manufacturing reasons unknown to common law or equity or the jurisprudence of Texas or the Nation, calling them "equities", to award Aluminum Company of America and Crown Central Petroleum Corporation the property of petitioners, which had never been divested by due process of law.

(b) By utilizing "assumptions" about a settlement agreement made by petitioners with Guy F. Stovall and F. E. Appling, the instigators of the foreclosure proceeding, filed with the Court of Civil Appeals and the Supreme Court, against petitioners contentions and as reasons for upholding the tax foreclosure sale and for destroying petitioners' property, when said agreement, to which Aluminum Company of America and Crown Central Petroleum Corporation were parties, expressly provided against any such effect being given it.

(c) By using the sale, in the exercise of the Constitutionally protected *jus disponendi*, of an interest in the property to Wherry and Green, after the "foreclosure sale," as a reason for destroying the petitioners' property rights.

(d) By deciding the case on false issues and false assumptions as to the record, refusing to give effect to the true issues and to dispose of the case on the actual facts of the record and the actual issues before the court.

STATUTES INVOLVED

The statutes involved appear in the Revised Civil Statutes of Texas, "Title 122 Taxation", Chapters 7 to 11 inclusive; and the directly involved and some related Articles are reproduced with certain constitutional provisions and with Rule 117a of the Texas Rules of Civil Procedure governing publication citation in tax foreclosures, as it read at the time in question, in Appendix A, Pages 22 to 60 infra.

STATEMENT OF THE CASE

In this case Petitioners brought a direct action to set aside a purported tax foreclosure sale effectuated in proceedings in which non-existent "liens" securing non-existent "taxes" were foreclosed by a court which had, by its statutory warrant of power, no jurisdiction of the land, and never obtained jurisdiction of the non-resident owner, Mineral Holding Trust, in any lawfully prescribed manner. The details we now review[1].

After unsuccessful efforts, the last in 1949, the first in 1935 before he himself bought the surface and half the mineral interest in the tract in question, to buy Mineral

[1] There is no dispute about the facts, as appears from the findings by all the State Courts which have passed upon them (See Appendix B); accordingly record references are minimized.

Holding Trust's mineral title, Guy F. Stovall, for himself and F. E. Appling, induced the Jackson County Tax Assessor to make a false statement to the effect that there were, according to the delinquent tax rolls of Jackson County, delinquent taxes in the sum of $187.82 due from petitioner and against its mineral interest for the years 1921 to 1935, and 1940 to 1949, both inclusive (S. of F. 147, 152, 156, 157, 207, 476, 477). The statement was on one of two forms, P. Ex. 32 (S. of F. 2, P. 147) or D. Ex. 4 (S. of F, 2, P. 227), each to the effect stated.

No taxes had been assessed against petitioner, or its minerals, for years prior to 1936. (No other severed non-producing mineral estates have ever been taxed in Jackson County for years prior to 1936. See Ex. 31, S. of F. 2, Page 145).

Mineral Holding Trust rendered its minerals for taxation and paid taxes duly assessed thereon for 1936 to 1940 inclusive.

Its principal owner died in 1942 — a Mr. Cocklin of St. Paul. His widow inherited his interest. The trust was owned by St. Paul, Minnesota, residents; and its trustees were of St. Paul.

No taxes were assessed, currently or by back assessment, against the trust or its lands for the years 1941 to 1949 inclusive.

Mineral Holding Trust's land appeared on no current and on no delinquent tax roll, except for the years on which taxes were assessed and paid as above stated.

The severed non-producing mineral interests in Jackson County are still, for the most part, unassessed. Petitioner's interest is the only one of such interests ever selected for sale.

There was no pretense at compliance with the course of the law, by which alone tax liability and lien must be fixed.

There was only the fraudulent statement of the Tax Assessor misrepresenting what the tax records reflected.

Foreclosure suit was filed on the strength of the Tax Assessor's false statement.

The Court had foreclosure jurisdiction, under power, first extended in 1895, with respect to "lands returned delinquent", but over no others. Petitioner's lands had never been "returned delinquent."

"Mineral Holding Trust of St. Paul, Minnesota" was grantee in the deed under which petitioners hold (It has been of record since 1922). This fact was actually known to the County Attorney. Also the Trust's St. Paul mailing addresses were shown in the records of Tax Assessments and payments for 1936 to 1940 inclusive and could have been learned with the slightest diligence. The Tax Assessor testified he would have furnished the address of the Trust shown on the tax records if requested (S. of F. P. 156).

Under Rule 117a of the Texas Rules of Civil Procedure, a non-resident taxpayer could be cited by publication only if its address was unknown and could not be ascertained by "diligent inquiry". Affidavit to this effect was required, on penal responsibility, from the County Attorney. In our case the address was known and could have been ascertained on inquiry (except from unlikely sources). Rule 117a additionally provided that if the tax records showed an address, citation by publication of a non-resident taxpayer could not be had without prior unsuccessful attempt at personal non-resident service, proved by affidavit. No attempt at personal non-resident service was in fact made. Affidavit of such an attempt and failure was not filed. Instead, citation was by publication on an affidavit that is a clumsy simulation of the authorization of the Supreme Court under circumstances that were not those present in this case. Neither the Supreme Court dissenters, the Court of Civil Appeals, nor we can read it as having the

simple meaning required of it even under those circumstances, under penal responsibility for false swearing, that the address of Mineral Holding Trust is unknown and cannot be ascertained after diligent inquiry. In fact the deed record address was known. In fact the tax record address could have been known to anyone on slightest proper inquiry. The publication citation was not authorized in due course of the law, and what was done deprived petitioners of due process.

Non-existent "liens" securing non existent "taxes" were foreclosured by a Court without jurisdiction of the land in a proceeding in which Mineral Holding Trust, the owner, was not summoned as required by law, of which it had no knowledge, and to which if was, therefore, in no sense a party.

Stovall bid in the property on the "foreclosure sale" for $400.00 (the trial court found it was then worth $5,000.00); he conveyed half interest to Appling; and before lapse of the two year period permitted for redemption by paying prescribed penalty, these two conveyed the minerals by lease to Alcoa (buying for itself and joint venturer Crown) for $6400.00 cash bonus, royalty and a side agreement not to develop until expiration of the two year redemption period. Though warned by their lawyers of probable invalidity of the tax sale, these lessees made no examination of the Court or tax records. Though "curing" all other tax titles in their block, they ignored this one.

Petitioners Wherry and Green, independent oil operators looking for prospects, paid $5,000.00 for a lease from Mineral Holding Trust and a deed conveying half its title. All petitioners then brought this action, a direct attack, to set aside the foreclosure sale.

The trial court (infra, pages 61 to 80), found the facts as we have stated them, but denied relief.

While the Case was before the Court of Civil Appeals, Stovall and Appling substantially yielded up to petitioners the fruits of their fraud still retained by them, by written agreement which provided, with joinder of Alcoa and Crown, that the settlement would not prejudice the case as between Petitioners and Alcoa and Crown (quoted in material part in Par. 6 of Motion for rehearing, Appendix p. 118). This agreement was respected by the Court of Civil Appeals, but not by the Supreme Court.

The Court of Civil Appeals expressed shock at the fraud practiced upon owner and Court, held the foreclosing Court had no jurisdiction to order the land sold because no taxes and no lien had been imposed, intimated though it did not decide that such Court probably had no jurisdiction of the person, and held that Alcoa and Crown could not claim to be bona fide purchasers because the judgment decreed a legal impossibility, *viz*: that delinquent taxes were due without penalties and interest being due, putting any purchaser on inquiry, and because the judgment roll put any purchaser on notice because of the extraordinary affidavit basing citation by publication[2].

The Texas Supreme Court granted writ of error and, with three justices dissenting, reversed the judgment of the Court of Civil Appeals. In doing so, the majority did not squarely meet the issues as they are made, did not accurately state the record as it exists, and did not correctly deal with the holdings of the Court it reversed. It

[2] We have always contended that there can be no innocent purchaser defense in a direct attack where the issue is jurisdiction. See *American Law Institute, Restatement of the Law of Judgments*, Sec. 115, Comment page 561. The issue in such a case is whether the judgment is void. Equities have never been a defense to actions to set aside void judgments, or void proceedings thereunder. Bona fide purchase is a defense only under our registration statutes, here inapplicable, and to protect legal title against secret equity. (The issue here is whether legal title was divested.) Heretofore the foregoing has been horn-book law. The manufacture of a contrary principle in this case frustrates the guarantee of the Fourteenth Amendment. If State law can do that, we have nullification. See Argument, *infra*.

assumed, and so assuming decided the case, that there was irregular assessment of taxes; whereas there was no assessment, and the whole case depends upon the effect of total absence of assessment procedure. It twisted the issue into one of whether a judgment is void because it allows recovery of taxes which are due, but does not allow penalty. It falsely attributes to the Court of Civil Appeals a basic holding, and to us the contention, that a judgment for taxes which are lawfully due is void if it does not also award penalties. It manufactures doctrines to defeat the constitutional guarantee on which we depend and which brooks no frustration. It frankly uses assumptions (apparently not even reading the agreement) about the settlement made with Stovall and Appling as a reason for denying our property right, though, with the written joinder of Alcoa and Crown, the agreement was under no circumstances to be given any such effect. That Mineral Holding Trust conveyed to Wherry and Green in the exercise of the *jus disponendi* aspect of its constitutionally protected right of property, is made a reason for destroying that right.

In short, in the majority, there was a total breakdown of due process in the decision of this very case. Its departure from established judicial approaches by failure to pass upon the true issues, by erroneously stating the opinion below and the contentions of the parties, by departing from the record, and by not honoring our settlement contract, and its overall failure to recognize and grant our constitutional right, are our bill of particulars.

Three dissenting judges held the foreclosure sale a nullity because of lack of any tax assessment, and lack of jurisdiction in the foreclosing court over either the land or the person of Mineral Holding Trust.

The constitional point is inherent in our every pleading and argument in the case, and in authorities argued

throughout. In supplemental statement of position filed in the Court of Civil Appeals, we took the explicit position that to deny our contentions would deny the due process guaranteed by the Fourteenth Amendment. After we prevailed by judgment of the Court of Civil Appeals, we took the position, in answer to the petition for writ of error, that to overturn the Court of Civil Appeals' judgment would result in depriving us of our property without due process. Our Supreme Court briefs argued this constitutional position. Our motion for rehearing elaborated it. (See Appendix C, Pages 113 to 137 infra). Our motion for rehearing was summarily overruled, but not before the Honorable Gordon Simpson, formerly a Justice of the Texas Supreme Court, Walter Koch of Austin, and Melvin Adler of Fort Worth, had separately voiced strong *amicus curiae* protests against the destruction of the certainty and assurance of the rule of law which results from the majority's action in this cause.

ARGUMENT

Preliminary Statement

Violence is done by the Texas Supreme Court majority to the rule of law assured by the Fourteenth Amendment. That rule is uniform and absolute. The Constitution's command pays no regard to the status or to the relative political or economic power or persons, requiring that the course of the law be evenly followed, though the controversy be between the uninfluential, including non-residents, and the powerful; and it brooks no nullification by the invention of excuses for disobedience such as appear in the opinion below.

Our lands have been held to have been taken by processes which do not include any of the steps which are the due course of the law. There has been substituted a shocking

fraud on the land owner and the Court, which denies essentials of due process.

The foreclosing court acted beyond the scope of its power because the lands were not lands "returned delinquent", such as are alone committed to the Court's power.

The foreclosing court acted without the notice required by law to give it power over Mineral Holding Trust, and without any actual or fair notice to it and without any opportunity to it to be heard.

In our case, there is no reason for our property's destruction that is ascertainable from the record or the opinion or the law books. If, in our case, the rule of fraud and artitrary power can displace the rule of law, like result is possible in other cases. The foreclosure proceedings are of the kind prescribed by Justice Field in *Bradstreet* v. *Neptune Ins. Co.*, 3 Sumn. 600, as "mere mockeries and in no sense judicial proceedings", which "ought to be deemed both ex directo *in rem* and collaterally, to be mere arbitrary edicts and substantial frauds." In both the foreclosure proceeding and in the attack upon it there have been fatal departures from established modes and norms of consideration. *Windsor* v. *McVeigh*, 93 U.S. 274, 281-3. We pray intervention of this Court in our and the general interest.

The Assessment Process

In ad valorem tax assessment, due process is "one which, following the forms of law, is appropriate***. It must be pursued in the ordinary mode prescribed by the law." *Turpin* v. *Lemon*, 187 U.S. 51, 58; see also *Hagar* v. *Reclamation District*, 111 U.S. 701, 707-9; *Central of Georgia Railway Company* v. *Wright*, 207 U. S. 127, 138. The false certificate of the tax assessor was not an exercise of lawful power, but an arbitrary fraud not countenanced by law, an

act in destruction and not fulfillment of due process. "Arbitrary power is not law. The enforcement of these limitations by judicial process is a device of self-governing communities to protect the rights of individuals — as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government." *Hurtado* v. *California,* 110 U.S. 516, 536.

The statutes prescribe assessment procedures, at specified times, which had they been followed would have accorded due process. By law, valuations recommended by the Assessor are accepted or changed by the Board of Equalization after hearing, and the resultant triplicate lists become, by Board order approving them, the tax rolls, and are filed in three public places. These rolls are the sole impact of taxing power upon owner and property[3].

All taxes levied on current rolls and not paid on time carry penalty and interest (Art. 7336). When taxes are not timely paid, delinquent rolls are prepared with approval of the Board of Equilization, and filed; whereupon the Assessor-Collector gives thirty days notice to the affected owners. After the notice period, it is the duty of the County Attorney to file suit to recover taxes delinquent for all years since 1908 (Articles 7336 Sec. (e), 7336f, 7319, 7320, 7321, 7322, 7323, 7324, 7325, 7326).

On lands not currently assessed in previous years, Chapter 11 of Title 122 provides procedures for back assess-

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[3] *Constitution*, Art. VIII, Sections 3, 11, 13, 15, 18, *Statutes*, Arts. 7189, 7198, 7205, 7206, 7207, 7211, 7212, 7218, 7219, 7220, 7221, 7222, 7223, 7224, 7253, 7254, 7265, 7266, reproduced in Appendix A. "Until his property has been thus assessed, the taxpayer cannot be called upon for its payment. No liability for it attaches either to him or his property." *George* v. *Dean*, 47 Tex. 73. "Before a list made by an assessor can be looked to in any way to fix the liability on the taxpayer or his property, the list must be approved by the County Commissioners' Court sitting as a Board of Equalization." *Chisholm* v. *Adams*, 71 Tex. 678, 10 S.W. 336. (See discussion in *State* v. *Chicago, R.I. & G. Ry. Co.*, 263 S.W. 249 (Tex. Comm. App.).

ment marked by equivalent safeguards: equalization by the Board; preparation by the same processes of delinquent rolls which, after Board adoption, are publicly filed in triplicate, and secured by lien upon the property (Articles 7346, 7347, 7348, 7349, 7350, 7352, 7353, 7354, 7355, 7356, 7357); and after the list of properties is advertised "in the manner provided in Article 7323," "suit may be filed in the same manner as provided by law for the enforced collection of delinquent taxes." (Art. 7349).

The completely independent necessity of following prescribed assessment processes in Texas grows from the fact that only before the Board of Equalization does a taxpayer have his indispensable right to a hearing on the issues of values and equalization. In the framework of the statutory procedure he has his only guarantee of hearing and freedom from arbitrary action; since no court can decide the questions at issue in such process. From these considerations comes the rigid and constitutional necessity of fair and substantial observance of the statutory scheme of assessment.[4]

Judicial Procedure — Jurisdiction of the Land

Without any tax or lien, as a basis for proceedings or judgment, the foreclosing Court acted without jurisdiction. Constitutionally, provision is made in Texas for foreclosure by summary sales only (Constitution Art. VIII, Sec. 13, Page 23 infra); but District Courts have had since 1895[5] statutory jurisdiction to foreclose tax liens on "all lands

[4] Appropriately, defenses allowed in court proceedings are only such defenses as are available in a court with jurisdiction, which jurisdiction is properly presupposed. Article 7329. No court has statutory power to decide matters entrusted to the Board of Equalization; also a court is constitutionally barred from the exercise of any save judicial power. (See Art. II Sec. 1, Infra P. 22).

[5] Ch. 42, Acts 24th Leg. Reg. Session 1895 (10 Gammel's Laws, P. 780). The jurisdictional grant was valid. *Brown v. Bonaugli*, 111 Tex. 275, 232 S.W. 490.

which have been returned delinquent" (present Art. 7320) with certain exceptions (Art. 7338)[6]; and they now have jurisdiction after the preparation of the back assessment rolls and notice to the taxpayer to foreclose for taxes assessed by such. (Arts. 7348, 7349). The simple and sole keystone to jurisdiction is delinquency evidenced by the delinquent rolls; public records.

To accord due process in a judicial foreclosure, there must be a court which has the power, by the laws of its existence, to exercise the foreclosure jurisdiction. So much is demonstrated by Texas cases. *Templeton* v. *Ferguson*, 89 Tex. 47, 33 S.W. 329; *Harrison v. Orr*, 296 S.W. 871 (Tex. Comm. App.). The Federal Courts lay down the same rule, *Pennoyer* v. *Neff*, 95 U.S. 714, at 733; *National Exchange Bank of Tiffin* v. *Wiley*, 195 U.S. 257, 269-70; *Thompson* v. *Whitman*, 18 Wall. 457. Common sense, the history of the jurisdiction, and the language of Art. 7320 require the conclusion that the returning of lands delinquent, or delinquency after back-assessment by prescribed procedures (Art. 7349), is a jurisdictional requirement going to the power of the court and not a mere rule for guidance of decision. *Interstate Commerce Commission* v. *Northern Pacific Ry. Co.*, 216 U.S. 538, 543-4. This conclusion is firmly established by Texas authority cited note 6, *supra*.

No court, though of general jurisdiction, can exercise power not granted it. No jurisdiction has been granted any court with respect to land, like ours, never returned delinquent. Also no jurisdiction has ever been granted a

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[6] Heretofore exercise of tax foreclosure jurisdiction not granted, i.e., over lands not returned delinquent, as well as the attempted exercise of jurisdiction over lands covered by the exceptions to jurisdiction in Art. 7338, have been held to be *brutum fulmen* . . . *Schaffer* v. *Davidson*, 97 S.W. 858 (writ of error refused), *Harrison* v. *Orr*, 296 S.W. 871 (Tex. Comm. App.), *Mote* v. *Thompson*, 156 S.W. 1105 (writ of error refused).

Court to assess taxes, a power the foreclosing court necessarily exercised if it effectively foreclosed on our land as for taxes. (See separation of powers clause, Art. II, Sec. 1, Constitution, infra Page 22).

The Supreme Court in this case denied even the right of direct attack, the minimal remedy available in our procedure, in a situation for which due process requires some remedy, for attack upon a judicial tax sale of lands never returned delinquent, never back-assessed, and, therefore never within any Court's foreclosure power.[7]

Judicial Procedure — Jurisdiction of the Person

Due process in court foreclosure requires notice and hearing by the prescribed processes, which must be fair; but the decision herein upholds a tax sale in connection with which there has in fact been given no notice whatever, and no notice prescribed by the law, at any stage of the proceedings. The so-called citation by publication in fact meets no requirement of Rule 117a. (Appendix Page 56 infra.)

Any sale without notice and opportunity to be heard is void; nor can the purchaser's evidence of title be made conclusive of due process when in fact it has not been accorded. *Marx* v. *Hanthorn*, 148 U.S. 172 — "* * * as the legislature could not deprive one of his property by making his adversary's claim to it conclusive of its own validity,

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[7] The trial court, Court of Civil Appeals and dissent held the attack direct; the Supreme Court majority does not deny that it is such. Neither could it, under a long line of decisions, including its own recent one in *Ditmore Land & Cattle Co.* v. *Hicks*, 290 S.W. (2d) 499, following *Harrison* v. *Sharpe*, 210 S.W. 731, writ of error refused, *Rowland* v. *Klepper*, 227 S.W. 1096 (Comm. App.), and *Shaffer* v. *Schaleben*, 236 S.W. (2d) 234, writ refused. Apparently a purchaser in some circumstances can rely, as against a collateral attack, on a regular judgment; but a judgment void in fact can always be shown to be such as against anyone, provided the attack is direct. (Otherwise, there would be instances of complete lack of remedy to persons who have had their property taken without due process, a result constitutionally inadmissible.) See *Templeton* v. *Ferguson*, 89 Tex. 47, 33 S.W. 329; *Crawford* v. *McDonald*, 88 Tex. 626, 33 SW 521.

it could not make a tax deed conclusive evidence of the holder's title to land." *Turpin* v. *Lemon*, 187 U.S. 51, 58. Notice by publication must be such as is both authorized and fair. *Walker* v. *City of Hutchinson*, U.S. Sup. Ct. Dec. 10, 1956, 1 L. Ed. (2d) 178; *Covey* v. *Town of Somers*, 351 U.S. 141; *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306; *Londoner* v. *Denver*, 210 U.S. 373, 386. In our case the publication was not authorized and its very employment was incident to the fraud.[8]

THE ACTION OF THE MAJORITY BELOW

The issue narrows to whether a State Court can invent, or apply, doctrines to nullify the Constitution's imperative. Mineral Holding Trust was the owner. Of Constitutional necessity it remains the owner unless its property has been taken by due process. It, itself, has performed no act to cause or permit involuntary divestment of its ownership. Its partial exercise of one aspect of its right, the *jus disponendi*, has merely placed its vendees *pro tanto* in its shoes, and has not, as the majority seem to hold, destroyed

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8 The language of the affidavit is:

"The residence of each of the defendants alleged in Plaintiff's Original Petition on file in the above entitled and numbered cause alleged as being 'Unknown' is in fact unknown and the parties described in said petition as the 'Unknown owner or owners' of the land described therein are also unknown, and that after due dilligence and inquiry by the Tax Collector of Jackson County, Texas, and by me, as attorney for plaintiff, were not and cannot be determined and ascertained" (S. of F. Vol. 2, Page 29).

The Supreme Court thought this could mean that residence alleged to be unknown could not be ascertained after diligent inquiry. We disagree; but, if so, the pertinent allegations of the petition which must be looked to to supply meaning are:

"The defendants are:

* * *

"Mineral Holding Trust, a partnership and/or unincorporated concern, the owners, partners and legal representatives, their heirs and legal representatives of Mineral Holding Trust, a partnership and/or unincorporated concern, the names and addresses of whom and which are to Plaintiff unknown" (S. of F. Vol. 2, Pages 5-6).

The construction issue then becomes, can the phrase "the names and addresses of whom and which are to Plaintiff unknown," refer to a concern the name of which is known and has so recently been stated by the pleader. Obviously, no penal responsibility was assumed by the maker of this affidavit.

its property both in its own hands and in the hands of its vendee.

Nor could Alcoa and Crown acquire the Mineral Holding Trust title unless it was divested by due process. Everyone, buying under a judgment of any kind, must know and take into account the Constitution, at least within the framework of reasonable remedies furnished, and which must be supplied, by State law. A purchaser, even under the most perfect seeming judgment in Texas, must take into account the remedy of direct attack afforded as the minimal remedy for voidness in fact, in a situation in which some remedy must be accorded, at any time within four years. Constitutionally, judgments must deserve respect under the due process clause before they can be accorded it; otherwise, the Temple would, without possibility of cleansing, be made the sport of such fraud and denial of basic decencies as is here present. Such considerations are the reasons for the universal rule that there can be no innocent purchase against a void judgment.[9]

The present is not even an action in equity. It is one such as was known to common law and established by the Supreme Court of Texas as an action at law to set aside a judgment obtained without jurisdiction and by fraudulent imposition. *Heath* v. *Layne*, 62 Tex. 686, *Ruenbuhl* v. *Heffron*, 38 S.W. 1028, *Freeman on Judgments*, 5th Ed. Sec. 226. Of course, our system being blended, had respondents discharged any valid obligation of petitioners, they could have asserted right to reimbursement; and that is all. *G.H.&S.A.* v. *Blakeney*, 73 Tex. 180, 11 S.W. 174.

In giving effect to reasons, invented by it so far as we can read the law books, frustrating the Fourteenth Amend-

[9] American Law Institute, Restatement of the Law of Judgments, Sec. 115, Comment Page 561; *Templeton* v. *Ferguson*, 89 Tex. 47, 33 S.W. 329.

ment as well as established doctrines of Texas law, the Supreme Court majority departed from the required course of judicial action in deciding the issues. We realize that mere error of law where Constitutional issues are not present is not denial of due process; but the opinion of the majority deals with matters involving due process, and also does such violence to our contentions and to the record that, we submit, its very opinion would be denial of due process even if Constitutional issues were not present; since in any case the record must be abided and fairness accorded the issues. We briefly review the opinion:

The majority, unlike the dissent, does not squarely meet the fact of no assessment, no jurisdiction, and fraudulent mockery of law. It transmutes the issue into one of "irregularity" of assessment and assumes its existence contrary to the very facts it recites. (299 S.W. (2d) at 281). It assimilates our case of absolute lack of power to cases where jurisdiction is present, but relief is granted in excess of right (*Ibid* 282), and returns to this approach by posing the issue as to whether omission of interest and penalties from a judgment allowing recovery for taxes lawfully assessed renders the judgment void (*Ibid* 283), an issue not presented. The majority relate a conversation between the Assessor and attorney on the subject of penalty and interest (*Ibid* 283-4), which we do not find in the record. If it occurred, these two worthies were in the extra-legal current of the fraud. With the thought that the District Court is a court of general jurisdiction, the majority attempts distinction of indistinguishable cases holding judgment of such courts to be void when rendered in the exercise of ungranted power. It illogically sees jurisdictional difference between a County Court granting divorce or a Probate Court administering a living person's estate, and a District Court foreclosing a non-existent "tax lien" on lands "not

returned delinquent": each is a court of general jurisdiction exercising power not vouchsafed it (*Ibid* 283).

The majority handling of the personal jurisdiction issue pays no attention to the pleading, without which the affidavit has no meaning, but holds that the affidavit can be read to mean that the address of Mineral Holding Trust (not mentioned in it) could not be ascertained after diligent inquiry. (See note 8, Page 16 *supra*). The opinion holds, in connection with the required effort at personal service, that the issue "must be determined within the meaning of the affidavit itself." (*Ibid* 284) This affidavit cured the total lack of jurisdiction in fact! It is intimated that if personal service had been attempted, it might not have been successful (*Ibid* 284-5); but the very prerequisite of publication notice by the prescribed course of law is that very failure.

Apparently aware that something else is necessary, the majority concedes right of recovery against Stovall and Appling, and from other circumstances, says that our minerals cannot be recovered from Alcoa and Crown. These other circumstances are:

The purchase by Alcoa and Crown.

The purchase of a part of Mineral Holding Trust's interest by Wherry and Green.

The settlement with Stovall and Appling, which explicitly provides against such prejudice.

The opening section of this portion of our argument has discussed these matters. If permitted to prevail, the result is by doctrines heretofore unknown to Texas or other law; and we submit that no court has the power to interpose such doctrines or frustrate the absolute command, a command that brooks no countervailing rule, that no person shall be deprived of property without due process of law.

CONCLUSION

For the foregoing reasons, we submit that writ of certiorari should be granted.

Respectfully,

JOHN E. DAUBNEY
Pioneer Bldg.
St. Paul, Minnesota

W. J. BARNES
415 Texas National Bank Bldg.
Houston 2, Texas

KNOX W. GILMORE
415 Texas National Bank Bldg.
Houston 2, Texas

JOHN W. STAYTON
Capitol National Bank Bldg.
Austin, Texas

JOYCE COX
2828 Gulf Bldg.
Houston 2, Texas
Attorneys for Petitioners,
Mineral Holding Trust,
R. B. Wherry and C. A. Green

PROOF OF SERVICE

I, Joyce Cox, one of the attorneys for Petitioners herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 22nd day of May, 1957, I served copies of the foregoing petition for writ of certiorari and appendix on respondents as follows:

Upon Aluminum Company of America and Crown Central Petroleum Company by delivering copies to Hon. Tarlton Morrow of the firm of Vinson, Elkins, Weems & Searls at his office in the Esperson Building, Houston, Texas.

By mailing copies to the Hon. Frank Guittard, Guittard & Henderson, P. O. Box 586, Victoria, Texas, and to Hon. S. G. Sample, P. O. Box 1806, Edna, Texas, they being attorneys of record for Guy F. Stovall and F. E. Appling.

Joyce Cox

JOYCE COX

APPENDIX A

Constitutional Statutory and Rule Provisions

1. From the Fourteenth Amendment to the Constitution of the United States:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. From the Constitution of Texas (Vernon's Constitution of the State of Texas Annotated):

1. *From Article I, Bill of Rights:*

Sec. 13. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law (P. 5).

Sec. 19. No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land (P. 6).

2. *From Article II, The Powers of Government:*

Sec. 1. The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistry, to-wit: Those which are Legislative to one; those which

are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted (P. 8).

3. *From Article VIII, Taxation and Revenue:*

Sec. 3. Taxes shall be levied and collected by general laws and for public purposes only (P. 71).

Sec. 11. All property, whether owned by persons or corporations shall be assessed for taxation, and the taxes paid in the county where situated, but the Legislature may, by a two-thirds vote, authorize the payment of taxes of non-residents of counties to be made at the office of the Comptroller of Public Accounts. And all lands and other property not rendered for taxation by the owner thereof shall be assessed at its fair value by the proper officer (P. 74).

Sec. 13. Provision shall be made by the first Legislature for the speedy sale, without the necessity of a suit in Court, of a sufficient portion of all lands and other property for the taxes due thereon, and every year thereafter for the sale in like manner of all lands and other property upon which the taxes have not been paid; and the deed of conveyance to the purchaser for all lands and other property thus sold shall be held to vest a good and perfect title in the purchaser thereof, subject to be impeached only for actual fraud; provided, that the former owner shall within two years from date of the filing for record of the Purchaser's Deed have the right to redeem the land on the following basis:

(1) Within the first year of the redemption period upon the payment of the amount of money paid for the land, including One ($1.00) Dollar Tax Deed Recording Fee and all taxes, penalties, interest and costs paid plus not exceeding twenty-five (25%) percent of the aggregate total;

(2) Within the last year of the redemption period upon the payment of the amount of money paid for the land, including One ($1.00) Dollar Tax Deed Recording Fee, and all taxes, penalties, interest and costs paid plus not exceeding fifty (50%) percent of the aggregate total. As amended Nov. 8, 1932 (P. 74).

Sec. 14. Except as provided in Section 16 of this Article, there shall be elected by the qualified voters of each county, an Assessor and Collector of Taxes, who shall hold his office for four years and until his successor is elected and qualified; and such Assessor and Collector of Taxes shall perform all the duties with respect to assessing property for the purposes of taxation and of collecting taxes, as may be prescribed by the Legislature (P. 75).

Sec. 15. The annual assessment made upon landed property shall be a special lien thereon; and all property, both real and personal, belonging to any delinquent taxpayer shall be liable to seizure and sale for the payment of all the taxes and penalties due by such delinquent; and such property may be sold for the payment of the taxes and penalties due by such delinquent, under such regulations as the Legislature may provide (P. 75).

Sec. 18. The Legislature shall provide for equalizing, as near as may be, the valuation of all property subject to or rendered for taxation (the County Commissioner's Court to constitute a board of equalization); and may also provide for the classification of all lands with reference to their value in the several counties (P. 76).

STATUTES

The Texas Tax Statutes are contained in Title 122, Vernon's Civil Statutes of the State of Texas, Vol. 20, commencing at Page 1. The Title is divided into eleven Chapters, of which Chapters these are here pertinent.

Chapter		First Article	Page
7.	Assessment and Assessors	7180a	421
8.	Collection and Collector	7245	474
9.	Back Taxes on Unrendered Lands	7299	537
10.	Delinquent Taxes	7319	545
11.	In certain Cases	7346	656

The property in question is an undivided one-half of the minerals under a 640-acre tract of land in Jackson County, Texas, subject to the provisions of the Statutes now quoted:

1. *From Chapter Seven — Assessment and Assessors.*

Article 7181a. Construction of "assessor" and "collector."

Hereafter, whenever the words "Assessor," "Assessor of Taxes," "Collector," "Collector of Taxes," or "Tax Collector" are used, either in Articles 7181 to 7359, inclusive, of Title 122 of the 1925 Revised Civil Statutes of Texas, including all amendments thereto, as well as the Revised Code of 1925, including all amendments being known as the 1925 Revised Civil Statutes of Texas, same shall be applicable to and mean the one office or officer of Assessor and Collector of Taxes, and shall be so construed as to accomplish the object and intent and carry out the purpose of Sections 14 and 16 of Article 8, of the Texas Constitution, as the same was amended on November 8, 1932 (P. 421).

Article 7189. When assessments made

Assessors of taxes shall, between the first day of January and the thirtieth day of April of each year, proceed to take a list of taxable property, real and personal, in his county and assess the value thereof in the manner following, to-wit: By calling upon the person, or by calling at the office, place of business or the residence of the person, and listing the

property required by law in his name, and requiring such person to make a statement under said oath of such property in the form hereinafter prescribed (P. 424).

Article 7198. Assessing

Each Assessor, when he shall have made the assessment of his county for each year, shall, on the first day of June of each year, or as soon thereafter as practicable, carry from each person's assessment the number of acres and its value on each survey of lands, lots or blocks to that particular survey, lot or block found on the abstract books provided in Articles 7196, 7197 and 7205; and all the parts of each survey or block placed on said abstract books shall be a credit to the assessor on that particular survey. Said assessor shall deduct the total number of acres rendered on each survey or block from the total number of acres of the whole survey or block as is shown by said abstract; and, if any part is left unrendered, then he shall assess the same to the owner or owners thereof, if known, and, if unknown, then to "unknown owners," and the value thereof shall be affixed by him, sanctioned by the board of equalization; provided, that the owner or owners of any survey and grant of land may show that the survey and grant in which they are interested does not contain the full complement of acres, showing how many acres are in fact embraced within the calls of the particular survey and grant (P. 432).

Article 7205. Assessment of property not rendered.

If the assessor of taxes discovers any real property in his county subject to taxation which has not been listed to him, he shall list and assess such property in the manner following, to-wit:

1. The name of the owner; if unknown, say "unknown."
2. Abstract number and number of certificate.
3. Number of the survey.

4. Name of the original grantee.
5. Number of acres.
6. The true and full value thereof.
7. The number of lot or lots.
8. The number of the block.
9. The true and full value thereof.
10. The name of the city or town, and give such other description of the lot or lots or parcels of land as may be necessary to better describe the same; and such assessment shall be as valid as if rendered by the owner thereof (P. 437).

Article 7206. Boards of equalization

Each commissioners court shall convene and sit as a board of equalization on the second Monday in May of each year, or as soon thereafter as practicable before the first day of June, to receive all the assessment lists or books of the assessors of their counties for inspection, correction or equalization and approval.

1. They shall cause the assessor to bring before them at such meeting all said assessment lists, books, etc., for inspection, and see that every person has rendered his property at a fair market value, and shall have power to send for persons, books and papers, swear and qualify persons, to ascertain the value of such property, and to lower or raise the value on the same.

2. They shall have power to correct errors in assessments.

3. They shall equalize improved lands in three classes, first-class to embrace the better quality of land and improvements, the second-class to embrace the second quality of lands and improvements, and the third-class to embrace lands of but small value or inferior improvements. The unimproved lands shall embrace first, second and third class, and all other property made as nearly uniform as possible.

4. After they have inspected and equalized as nearly as possible, they shall approve said lists or books and return same to the assessors for making up the general rolls, when said board shall meet again and approve the same if same be found correct.

5. Whenever said board shall find it their duty to raise the assessment of any person's property, they shall order the county clerk to give the person who rendered the same written notice that they desire to raise the value of same. They shall cause the county clerk to give ten days written notice before their meeting by publication in some newspaper, but, if none is published in the county, then by posting a written or printed notice in each justice's precinct, one of which must be at the court house door.

6. The assessors of taxes shall furnish said board on the first Monday in May of each year, or as soon thereafter as practicable, a certified list of names of all persons who either refuse to swear or to qualify or to have signed the oath required by law, together with the assessment of said person's property made by him through other information; and said board shall examine, equalize and correct assessments so made by the assessor, and when so revised, equalized and corrected, the same shall be approved (P. 439).

Article 7207. Assessment of real property for previous years.

If the assessor of taxes shall discover in his county any real property which has not been assessed or rendered for taxation for any year since 1870, he shall list and assess the same for each year for which it has not been assessed; in the manner prescribed in the preceding article; and such assessment shall be as valid and binding as though it had been rendered by the owner thereof; but no such real property shall be assessed by the assessor unless he has ascer-

tained by the certificate of the Comptroller the fact that the records of his office do not show that the property has been rendered or assessed for the year in which he assesses it (P. 446).

Article 7209. Supplemental roll.

Collectors of taxes of counties, cities and towns, when any taxpayer applies to them to ascertain the amount of his taxes, and the collector finds that his name or his property does not appear on the tax roll, shall assess said taxpayer then and there, collect the taxes and enter the same upon a supplemental tax roll to be made by him. He shall make out, on forms to be furnished by the Comptroller, three copies of such supplemental roll, one copy to be delivered to the Comptroller, one to be delivered to the county clerk, and one to be filed in the collector's office. Said supplemental tax roll shall be made out and delivered to the commissioners court with all other papers pertaining to the final settlement of said tax collector, and the same shall be examined and approved by the commissioners court, in like manner as upon the tax roll of the tax assessor. The oath shall be the same as is administered by tax assessors under existing law. The tax collector shall receive the following compensation for his services on all assessments made by him under this Act, to-wit: For assessing the State and county taxes, four cents for each one hundred dollars of property so assessed, and for assessing the poll tax, five cents for each poll; which fee shall be paid in the same way as the tax assessor's fee in Article 3937 (P. 448).

Article 7211. Equalization of assessments

Hereafter when any person, firm or corporation renders his, their or its property in this State for taxation to any tax assessor, and makes oath as to the kind, character, quality and quantity of such property, and the said officer

accepting said rendition from such person, firm or corporation of such property is satisfied that it is correctly and properly valued according to the reasonable cash market value of such property on the market at the time of its rendition, he shall list the same accordingly; but, if the assessor is satisfied that the value is below the reasonable cash market value of such property, he shall at once place on said rendition opposite each piece of property so rendered an amount equal to the reasonable cash market value of such property at the time of its rendition, and if such property shall be found to have no market value by such officer, then at such sum as said officer shall deem the real or intrinsic value of the property; and if the person listing such property or the owner thereof is not satisfied with the value placed on the property by the assessor, he shall so notify the assessor, and if desiring so to do make oath before the assessor that the valuation so fixed by said officer on said property is excessive; such officer to furnish such rendition, together with his valuation thereon and the oath of such person, firm or officer of any corporation, if any such oath has been made, to the commissioners' court of the county in which said rendition was made, which court shall hear evidence and determine the true value of such property on January First, 19..... (here give year for which assessment is made) as is herein provided; such officer or court shall take into consideration what said property could have been sold for any time within six months next before the first day of January of the year for which the property is rendered. (P. 449).

Article 7212. Boards may equalize

The Boards of Equalization shall have power, and it is made their official duty, to supervise the assessment of their respective counties, and, if satisfied that the valuation of any property is not in accordance with the laws of the State,

to increase or diminish the same and to affix the proper valuation thereto, as provided for in the preceding Article, and when any Assessor in this State shall have furnished said Court with the rendition as provided for in the preceding Article, it shall be the duty of such Court to call before it such persons as in its judgment may know the market value or true value of such property, as the case may be, by proper process, who shall testify under oath the character, quality, and quantity of such property, as well as the value thereof. Said Court, after hearing the evidence, shall fix the value of such property in accordance with the evidence so introduced and as provided for in the preceding Article, and their action in such case or cases shall be final; provided however, that if the Commissioners Court of any county who contracts with or employs any individual, firm, or corporation to compile taxation data, the compensation of such individual, firm or corporation may be paid on a pro rata basis from each county fund receiving any taxes derived from such valuation (P. 451).

Article 7218. To submit lists to board.

The assessor of taxes shall submit all the lists of property rendered to him prior to the first Monday in June to the board of equalizarion of his county on the first Monday in June or as soon thereafter as practicable, for their inspection, approval, correction or equalization. After said board shall have returned the corrected and approved lists of taxable property, the assessor of taxes shall proceed to assess all the unrendered property of his county as provided for in this title, and shall proceed to make out and prepare his roles or books of all the real and personal listed to him, in the form and manner prescribed by the Comptroller (P. 459).

Article 7219. Shall make out rolls in triplicate.

As soon as the board of equalization shall have examined, corrected and approved the assessor's list, the assessor of taxes shall prepare and make out a roll or book, as may be required by the Comptroller, from the list so corrected and approved, and three exact copies of the same, the original to be furnished to the collector of taxes, the second to the Comptroller, and the third to be filed in the county clerk's office for the inspection of the public. He shall also prepare a roll or book, and two exact copies thereof, to be distributed, the first to the collector of taxes, the second to the Comptroller, the third to be filed in the county clerk's office, of all the real and personal property which has not been listed to him (P. 460).

Article 7220. Also rolls of unrendered property

The assessor of taxes shall, after his list of unrendered real and personal property shall have been examined, corrected and approved by the board of equalization as provided by law, prepare and make out his rolls or books of all unrendered real and personal property listed by him in the manner and form prescribed by the Comptroller (P. 461).

Article 7221. And add up columns

The assessor of taxes shall add up and note the aggregate of each column on his roll or book, and he shall also make in each book or roll, under proper headings, a tabular statement showing the footings of the several columns upon each page, and he shall add up and set down under the respective headings the total of the several columns (P. 462).

Article 7222. Return and oath

The assessor of taxes shall, on or before the first day of August of each year for which the assessment is made,

return his rolls or assessments of the taxable property rendered to him or listed by him for that year, after they have been made in accordance with the provisions of this title, to the county board of equalization, verified by his affidavit,, substantially on the following form: (form omitted) (P. 462).

Article 7223. Lists, etc., filed

The assessor of taxes shall at the same time deliver to the board of equalization all the lists, statements of all property which shall have been made out or received by him, and arranged in alphabetical order, together with the roll withdrawn to aid him in the past assessment. The lists and statements shall be filed in the county clerk's office and remain there for the inspection of the public (P. 463).

Article 7224. Rolls, how distributed

After the board of equalization shall have examined the rolls or assessment books and made all corrections, if any be necessary, the assessor shall send one copy of each to the Comptroller, one copy of each to the collector of his county, and he shall file the other copies in the county clerk's office until the next assessment, when the assessor shall have the right to withdraw them and use as provided in this title.

2. *From Chapter Eight — Collection and Collector:*

Article 7253. Rolls to be a warrant

When any tax collector shall have received the assessment rolls or books of the county, he shall receipt to the commissioners court for the same; and said rolls or books shall be full and sufficient authority for said collector to receive and collect the taxes therein levied (P. 488).

Article 7254. Collector for all taxes

The tax collector shall be the receiver and collector of all taxes assessed upon the tax list in his county, whether assessed for the State or county, school, poor house or other purposes; and he shall proceed to collect the same according to law, and place the same when collected to the proper fund, and pay the same over to the proper authorities, as hereinafter provided (P. 489).

Article 7265. Non-residents

Non-residents of counties, owing State or county taxes, are hereby authorized to pay the same to the Comptroller; provided, that all taxes due by said non-residents shall be paid at the Comptroller's office on or before the first day of January next after the assessment of such taxes. The tax collectors shall be entitled to the commissions on all moneys paid by non-residents to the Comptroller, due their counties respectively (P. 511).

Article 7266. Forced collections to begin

If any person shall fail or refuse to pay the taxes imposed upon him or his property by law, until the first day of January next succeeding the return of the assessment roll of the county to the Comptroller, the tax collector shall, by virtue of his tax roll, seize and levy upon and sell so much personal property beloning to such person as may be sufficient to pay his taxes, together with all costs accruing thereon; provided, there shall be no levy on property when the owner thereof has the right to pay at the Comptroller's office, until a list of the persons who have paid their taxes at said office has been furnished the tax collector by the Comptroller. The Comptroller shall forward said list of paid taxes on or before the first day of February of each

year; and the tax collector shall, immediately on receipt of said list from the Comptroller, levy on and sell the property of such non-residents as have not paid their taxes, in accordance with the law regulating the sale of property for taxes (P. 511).

Article 7284b. Redemption from state or county tax sales

Whenever land is sold under a decree and judgment of court for taxes levied by or for the State, or by or for any County within the State, the owner of such property, or any one having an interest therein, shall have the right to redeem the same at any time within two years from the date of such sale upon payment of double the amount paid by the purchaser at such sale; provided that the purchaser at such foreclosure sale, and his assigns, shall not be entitled to the possession of the property sold for taxes until the expiration of two years from the date of such sale (P. 528).

3. *From Chapter Nine. Back Taxes on Unrendered Lands.*

Article 7299. Back taxes on unrendered lands

In all cases where lands or real estate have not been assessed for taxation for any year since the year one thousand eight hundred and seventy, the same shall be assessed and the taxes thereon collected in the mode prescribed in this chapter (P. 537).

Article 7300. Annual list

On the first day of July of each year, the Comptroller shall cause to be prepared a list of all unrendered lands in each county subject to taxation and not assessed, in which

shall be specified the name of the original grantee, the abstract number, the number of acres, the year for which such lands were unrendered, and the rate of State and county taxes for such year (P. 538).

Article 7301. List forwarded

Upon completion of such lists, the Comptroller shall forward the same to the board of equalization of the respective counties, with the verification that the said list is a true and correct statement of all the unrendered land and real estate in ..... county for the year ....., as shown by the records of his office (P. 538).

Article 7302. Board to value such lands

Upon receipt of such list or lists by the board of equalization of such county, they shall value each tract of land or parcel of real estate so mentioned and described in the said lists at their true and full value, as near as can be ascertained, for the year it was omitted to have been rendered (P. 538).

Article 7303. Making of rolls

When the board of equalization completes the valuation, they shall cause to be made out three separate rolls, in such manner as the Comptroller may prescribe; they shall place one in the hands of the tax collector, forward one to the Comptroller, and file one in the office of the county clerk for the inspection of the public (P. 538).

Article 7304. Collector to give notice

Upon receipt of the rolls by the tax collector, he shall advertise in some weekly newspaper published in his county, and, if no paper is published in his county, by posting

printed circulars in not less than eight public places in his county, for four consecutive weeks, that the rolls for the collection of taxes on unrendered land and real estate have been placed in his hands, and that unless the taxes are paid within sixty days after the date of such notice he will proceed to collect the same as provided by law for the collection of delinquent taxes (P. 538).

Article 7305. Collections enforced

After the expiration of said sixty days, if the taxes on any such lands are not paid, the tax collector shall proceed to enforce the collection of said taxes in the mode provided in this title for the enforced collection of delinquent taxes; and he shall be entitled to the same fees and penalties as are allowed him for the collection of other delinquent taxes (P. 538).

4. *From Chapter Ten.— Delinquent Taxes.*

Article 7319. "Real Property"

For the purpose of taxation, real property shall include all lands within this State, and all buildings and fixtures thereon and appertaining thereto, except such as are expressly exempted by law (P. 545).

Article 7320. A lien on land

All lands or lots which have been returned delinquent or reported sold to the State, or to any city or town, for taxes due thereon since the first day of January, 1885, or which may hereafter be returned delinquent or reported sold to the State, or to any city or town, shall be subject to the provisions of this chapter, and said taxes shall remain a

lien upon the said land, although the owner be unknown, or though it be listed in the name of a person not the actual owner; and though the ownership be changed, the land may be sold under the judgment of the court for all taxes, interest, penalty and costs shown to be due by such assessment for any preceding year (P. 546).

Article 7321. Listed by tax collector

The commissioners court of each county shall cause to be prepared by the tax collector, at the expense of the county (the compensation for making out the delinquent tax record to be fixed by the commissioners court) a list of all lands, lots or parts of lots sold to the State for taxes since the first day of January, 1885, and which have not been redeemed in their respective counties and unorganized counties attached thereto, and have such lists recorded in books to be called the "Delinquent Tax Record," showing when the lands or lots were reported delinquent or sold to the State for taxes, also the name of the owner at the time of such sale or delinquency, if known, the number of acres, the amount of taxes due when first sold, and the amount of all taxes assessed against the owner thereof and returned delinquent for each year as shown by the records of the tax collector's office; and, in making up the list or lists contemplated by this chapter, corrections and omissions in the description of any real estate embraced in such list or lists shall be made, so that when the corrections are made and the omissions supplied, the description will be such as is given in the abstracts of all the titled and patented lands in the State of Texas, or such as may be furnished by the Land Commissioner, and it shall be required, in bulk assessments, to apportion to each tract or lot of land separately, its pro rata share of the

entire tax, penalty and cost. The list for each county, when certified to by the county judge, and the assessment rolls and books on file in the tax collector's office, shall be prima facie evidence that all the requirements of the law have been complied with by the officers charged with any duty thereunder, as to the regularity of listing, assessing, levying of all taxes therein mentioned, and reporting as delinquent or sold to the State any real estate whatsoever, and that the amount alleged against said real estate is a true and correct charge; and, in case the description of the property in said list or assessment rolls or books is not sufficient to properly identify the same, and of which property there is sufficient description in the inventories in the assessor's office, then said inventories shall be admissable as evidence of the description of said property. This delinquent tax record for each county shall be delivered to and preserved by the county clerk in his office; and the commissioners court shall cause a duplicate of same to be sent to the Comptroller; provided, where the records are incomplete in any county, the Comptroller shall furnish such county with a certified copy of the delinquent list for any year or years (P. 548).

Article 7322. Delinquent tax record

On receipt of such delinquent tax record the county clerk of each of the counties of this State, respectively, shall certify the same to the commissioners court to examination and correction, and he shall thereafter cause the same to be recorded in a book labeled the "Delinquent Tax Record of.....County." The delinquent tax record shall be arranged numerically as to abstract numbers, and shall be accompanied by an index showing the names of delinquents in alphabetical order (P. 550).

Article 7323. Delinquent tax list published

Upon the completion of said delinquent tax record by any county in this State the commissioners court may, in their discretion, cause the same to be published in some newspaper published in the county once each week for three consecutive weeks, but if no newspaper is published in the county, such list may be published in a newspaper outside the county to be designated by the commissioners court, by contract duly entered into, and a publisher's fee of twenty-five cents shall be taxed against each such tract or parcel of land so advertised, which fee, when collected, shall be paid into the county treasury; and the commissioners court of said county shall not allow for said publication a greater amount than twenty-five cents for each tract of land so advertised and such publication and any other publication in a newspaper provided for in this chapter may be proved by affidavit of the printer of the newspaper, in which the publication was made, his foreman or principal clerk, annexed to a copy of the publication, specifying the times when and the paper in which publication was made. All corrections made in said record under this article shall be noted in the minutes of the commissioners court, and shall be certified by the county clerk to the Comptroller, who shall note the same upon his delinquent tax record. If such delinquent tax record be not published correctly, in accordance with the copy furnished such newspaper, then no compensation shall be allowed for such publication, but failure to so publish such list shall be no defense to a suit for taxes due (P. 550).

Article 7324. Notice to owners of delinquency

During the month of July each year, or as soon thereafter as practicable, the collector of taxes in each county of this

State shall mail to the tax roll address of each owner of any lands or lots situated in the county a notice showing the amount of taxes delinquent or past due and unpaid against all such lands and lots as shown by the delinquent tax record of the county on file in the office of the tax collector, a duplicate of which shall also have been filed in the office of the Comptroller of the State and approved by such office, but failure to send or receive such notice shall be no defense to a suit brought for taxes. Such notice shall also contain a brief description of the lands and lots appearing delinquent and the various sums or amounts due against such lands and lots for each year as they appear to be delinquent, according to such records, and it shall also recite that unless the owner of such lots or land described therein shall pay to the tax collector the amount of taxes, interest, penalties and costs set forth in such notice within thirty days from the date of notice, that the county or district attorney will institute suits for the collection of such moneys and for the foreclosure of the constitutional lien against such lands and lots. Each tax collector, as soon after mailing such notice as practicable, shall furnish to the County or District Attorney duplicate of all such notices mailed to the taxpayers in accordance with the provisions of this law, and also, lists of lands and lots located in the county appearing on the delinquent tax records in the name of "unknown" or "unknown owners", or in the name of persons whose correct address or place of residence in or out of the county said collector is unable by the use of diligence to discover or ascertain, against which taxes are delinquent, past due, and unpaid, and such lists or statements shall show the amount of State and County taxes delinquent, past due, and unpaid against each such tract or lot of land for each year they appear to be delinquent according to the delinquent tax records of the county, and shall likewise contain a brief

description of all such lands and lots. The tax collector shall furnish on demand of any person, firm or corporation like statements with reference to any particular lot or tract of land for whatever purpose desired, which shall be in all instances certified by him with the seal of his office attached: Whenever any person, or persons, firm or corporation, shall pay to the tax collector all the taxes, interest, penalties and costs shown by the delinquent tax records of the county to be due and unpaid against any tract, lot or parcel of land for all the years for which taxes may be shown to be due and unpaid, prior to the institution of suit for the collection thereof, the tax collector shall issue to such person or persons, firm or corporation, a receipt covering such payment as is now required by law (P. 552).

Article 7325. Notice, how made up

In making up the notices or statements provided for in the preceding article, each tax collector shall rely upon the delinquent tax records compiled as required by law, approved by the Commissioners court, and a duplicate of which has been filed in the office of the Comptroller, and which has or may be approved by the Comptroller. The tax collector, whenever there shall be one year or more or back taxes that have not been included in such delinquent tax records, shall prepare or cause to be prepared a supplement to such records which shall be prepared in duplicate, one copy to be filed in the office of the county clerk and one copy thereof to be furnished to the Comptroller subject to his approval; and whenever said supplement shall have been approved by the commissioners court and by the Comptroller, the tax collector shall rely thereon for the data covering delinquent taxes for said years in making out the notices or statements provided for in the preceding article. Said tax collector, in making up said delinquent tax record and

supplement, shall examine the records of the district court and county clerk's office of his county, and no tract of land shall be shown delinquent on any delinquent tax record for any year where the records of the district court or the county clerk's office show that the taxes for said year have been paid. It shall be the duty of each tax assessor to enter the post office address of each and every taxpayer after his name on the tax rolls, and the Comptroller shall provide a column for the entry of such addresses on the sheets furnished the assessors for making up tax rolls (P. 555).

Article 7326. Suits to foreclose tax lien

Whenever any taxes on real estate have become delinquent it shall be the duty of the county attorney upon the expiration of the thirty days notice provided for in the two preceding articles or as soon thereafter as practicable, to file suit in the name of the State of Texas in the district court of the county where such real estate is situated, for the total amount of taxes, interest, penalty and costs that have remained unpaid for all years since the thirty-first day of December, 1908, with interest computed thereon to the time fixed for the trial thereof at the rate of six per cent per annum, and shall pray for judgment for the payment of the several amounts so specified therein and shown to be due and unpaid by the delinquent tax records of said county; and also that such land be sold to satisfy said judgment for all taxes, interest, penalty and costs, and for such other relief as the State may be entitled to under the law and facts. All suits to enforce the collection of taxes as provided in this law shall include all lands in the county where the suit is brought, owned by the same persons on which delinquent taxes are due, and shall take precedence over all other suits pending in said district court. If through mistake, oversight or otherwise any tax due on any land owned by the

defendant is omitted from such suit, such omission shall not be any defense against the collection of the tax due and sued for. All delinquent tax records of said county in any county where such suit is brought shall be prima facie evidence of the true and correct amount of taxes and costs due by the defendant or defendants in such suit, and the same or certified copies thereof shall be admissible in the trial of such suit as evidence thereof. Such suit shall be brought as an ordinary foreclosure for debt, with averments as to the existence of a lien upon such land for such taxes, with interest at the rate of six per cent per annum, and shall pray for judgment for the foreclosure of the said lien and sale of said lands as under ordinary execution. The county attorney, or the attorney employed by the commissioners court, shall sign such petition as attorney for plaintiff. The county tax collector and county tax assessor shall furnish all affidavits, certified copies of the records of their respective offices and such other evidence as may be in their possession by virute of such office as may be applied for by the proper attorney prosecuting such suit, and shall be allowed a fee of fifty cents for each certified copy furnished upon such application. If the amount of taxes delinquent is not more than five dollars the commissioners court may have such suit for five dollars or less instituted or not as said court may deem to be for the best interests of the county. (P. 556).

Art. 7328a. Tax sales of real estate

That all sales of real estate made for the collection of delinquent taxes due thereon shall be made only after the foreclosure of tax lien securing same has been had in court of competent jurisdiction in accordance with existing laws governing the foreclosure of tax liens in delinquent tax suits (P. 582).

Art. 7329. Defense to tax suits

There shall be no defense to a suit for collection of delinquent taxes, as provided for in this chapter except:

1. That the defendant was not the owner of the land at the time the suit was filed.

2. That the taxes sued for have been paid, or

3. That the taxes sued for are in excess of the limit allowed by law, but this defense shall apply only to such excess (P. 583).

Art. 7330. Sheriff to execute deeds

In all cases in which lands have been sold, or may be sold, for default in the payment of taxes, the sheriff selling the same, or any of his successors in office, shall make a deed or deeds to the purchaser or to any other person to whom the purchaser may direct the deed to be made, and any such deed shall be held in any court of law or equity in this State to vest good and perfect title in the purchaser thereof, subject to be impeached only for actual fraud (P. 586).

Art. 7336. Penalty

(a) If any person shall pay, on or before November thirtieth of the year for which their assessment is made, one-half (½) of the taxes imposed by law on him or his property, then he shall have until the thirtieth day of the succeeding June, within which to pay the other one-half (½) of his said taxes without penalty or interest thereon.

If said taxpayer, after paying said one-half (½) of his taxes on or before November thirtieth, as hereinbefore provided, shall fail or refuse to pay, on or before June thirtieth next succeeding said November, the other one-half (½) of his said taxes, a penalty of eight (8%) per cent of the amount of said unpaid taxes shall accrue thereon.

If any person fails to pay one-half (½) of the taxes, imposed by law upon him or his property, on or before the thirtieth day of November of the year for which the assessment is made, then unless he pays all of the taxes (imposed by law on him or his property), on or before the thirty-first day of the succeeding January, the following penalty shall be payable thereon, to-wit: During the month of February, one (1%) per cent; during the month of March, two (2%) per cent; during the month of April, three (3%) per cent; during the month of May, four (4%) per cent; during the month of June, five (5%) per cent; and on and after the first day of July, eight (8%) per cent.

(b) All poll taxes and all ad valorem taxes, unless one-half (½) thereof have been paid on or before November thirthieth as hereinabove provided, shall become delinquent if not paid prior to February first of the year next succeeding the year for which the return of the assessment rolls of the county are made to the Comptroller of Public Accounts. If one-half (½) of said ad valorem taxes have been paid on or before the thirtieth day of November as herein provided, the remaining one-half (½) of such taxes shall be delinquent if not paid before the first day of July of the year next succeeding the year for which the return of the assessment rolls of the county are made to the Comptroller of Public Accounts.

(c) If one-half (½) of such ad valorem taxes have been paid on or before November thirtieth of the year in which the same are assessed, the discounts herein provided for shall be effective and shall apply to the last half of the ad valorem taxes if paid ninety (90), sixty (60), and thirty (30) days, respectively, prior to the first day of July, when the same become delinquent as herein provided; but such discount shall not apply to the first half of such taxes if

the same have been paid on or before November thirtieth of the year in which such assessment is made.

(d) All delinquent taxes shall bear interest at the rate of six (6%) per cent per annum from the date of their delinquency. All penalties and interest provided for in this Act shall, when collected, be paid to the State, counties, and districts, if any, in proportion to the taxes upon which the penalty and interest are collected. All discounts provided for in this Act shall, when allowed, be charged to the State, counties, and districts, if any, in proportion to the taxes upon which such discounts are allowed.

(e) The Assessor and Collector of Taxes shall, as of the first day of July of each year for which any State, county and district taxes for the preceding year remain unpaid, make up a list of the lands and lots and/or property on which any taxes for such preceding year are delinquent, charging against the same all unpaid taxes asesssed against the owner thereof on the rolls for said year.

Penalties, interest and costs accrued against any land, lots and/or property need not be entered by the Assessor and Collector of Taxes on said list, but in each and every instance all such penalties, interest and costs shall be and remain a statutory charge with the same force and effect as if entered on said list, and the Assessor and Collector of Taxes shall calculate and charge all such penalties, interest and costs on all delinquent tax statements or delinquent tax receipts issued by him.

Said list shall be made in triplicate and presented to the Commissioners' Court for examination and correction, and after being so examined and corrected said list in triplicate shall be approved by said Court. One copy thereof shall be filed with the County Clerk or Auditor, one copy retained and filed by the Assessor and Collector of Taxes,

and one copy forwarded to the Comptroller with the annual settlement report of the Assessor and Collector of Taxes. Said list, as compiled by the Assessor and Collector of Taxes, and corrected by the Commissioners' Court, or the rolls or books on file in the office of the Assessor and Collector of Taxes, shall be prima facie evidence that all the requirements of the law have been complied with by the officers of courts charged with any duty thereunder, as to regularity of listing, assessing, and levying all taxes therein set out, and that the amount assessed against said real estate is a true and correct charge. If the description of the real estate in said list or assessment rolls or books is not sufficient to identify the same, but there is a sufficient description of the inventories in the office of the Assessor and Collector of Taxes, then said inventories shall be admissible as evidence of the description of said property.

The Comptroller of Public Accounts shall prescribe suitable forms to be used by the Assessor and Collector of Taxes for noting thereon the payment of taxes in semi-annual installments. He shall also prescribe suitable forms for receipts, reports and for any other purpose necessary in carrying out the provisions of this Act.

This provision is cumulative of all other provisions of the Statutes of the State prescribing the duties of the Comptroller of Public Accounts (P. 603).

Art. 7336f. Remission of delinquent taxes, compilation of record of delinquent taxes not barred

Sec. 1. The collection of all delinquent, ad valorem taxes due the State, County, Municipality or other defined Subdivision that were delinquent prior to December 31, 1919, is forever barred.

Sec. 2. Any County having as many as two years' taxes delinquent which have not been included in the delinquent tax record, the Collector of taxes shall within two years from the effective date of this Act, cause to be compiled a delinquent tax record of all delinquent taxes not barred by this Act; the delinquent record shall be examined by the Commissioners' Court and the Comptroller or governing body, corrections may be ordered made, and when found correct and approved by them, payment for the compilation thereof shall be authorized at actual cost to the Tax Collector, proportionately from each the State and County taxes, or municipal taxes, first collected from such record, such cost in no case to exceed a sum equal to five (5c) cents per item or written line of the original copy of such record and in no event shall any compiling cost be charged to the taxpayer. The delinquent tax record when approved, shall be prima facie evidence of the delinquency shown thereon, and when there shall be as many as two years of delinquency accumulated which are not shown on the record, a recompilation, or a two year supplement thereto shall then be made as herein provided. Tax Collectors shall cause to be compiled like records of taxes delinquent due any district for which they collect from tax rolls other than the State and county rolls, and when approved by the governing body of the particular district, the cost of same shall be allowed in the manner herein provided (P. 611).

Art. 7338. Exemptions from this chapter

Real estate which may have been rendered for taxes and paid under erroneous description given in assessment rolls, or lands that may have been duly assessed and taxes paid on one assessment, or lands which may have been assessed and taxes paid thereon in a county other than the one in

which they are located, or lands which may have been sold to the State and upon which taxes have been paid and through error not credited in the assessment rolls, shall not be deemed subject to the provisions of this chapter. When called upon, the Land Commissioner shall furnish the county judge of any county compiling its own delinquent tax record with such information as may enable him to determine the validity or locality of such surveys and grants as have not been shown by the printed abstracts of the Land Office.

5. *From Chapter Eleven — In Certain Cases*

Art. 7346. Property omitted from rolls

Whenever any commissioners court shall discover through notice from the tax collector or otherwise that any real property has been omitted from the tax rolls for any year or years since 1884, or shall find that any previous assessments on any real property for the years mentioned are invalid, or have been declared invalid for any reason by any district court in a suit to enforce the collection of taxes on said properties, they may, at any meeting of the court, order a list of such properties to be made in triplicate and fix a compensation therefor; the said list to show a complete description of such properties and for what years such properties were omitted from the tax rolls, or for what years the assessments are found to be invalid and should be canceled and re-assessed, or to have been declared invalid and thereby canceled by any district court in a suit to enforce the collection of taxes. No re-assessment of any property shall be held against any innocent purchaser of the same if the tax records of any county fail to show any assessment (for any year so re-assessed) by which said prop-

erty can be identified and that the taxes are unpaid. The above exception, with the same limitation, shall also apply as to all past judgments of district courts canceling invalid assessments (P. 656).

Art. 7347. Property listed assessed

When said list has been so made up the commissioners court may, at any meeting, order a cancellation of such properties in said list that are shown to have been previously assessed, but which assessments are found to be invalid and have not been canceled by any former order of the commissioners court, or by decree of any district court; and shall then refer such list of properties to be assessed or re-assessed to the tax assessor who shall proceed at once to make an assessment of all said properties, from the data given by said list (the certificate of the Comptroller as to assessments or re-assessments made by the tax assessor shall not be necessary as required under Article 7207, but he shall furnish all blank forms needed and that uniformity may be had in all counties), and when completed shall submit the same to the commissioners court, who shall pass upon the valuations fixed by him; and, when approved as to the values, shall cause the taxes to be computed and extended at the tax rate in effect for each separate year mentioned in said list; and, in addition thereto, shall cause to be added a penalty equal in amount to what would be six per cent interest to the date of making said list from the date such properties would have been delinquent had same been properly rendered by the owner thereof at the time and for the years stated in said list; provided, that the certificate of any tax collector given during his term of office that all taxes have been paid to the date of such certificate on any certain piece of property, which is fully described in such certificate, or if the tax rolls of any county

fail to show any assessments against such property sufficient to identify it, and that the same was unpaid at the dates such rolls may have been examined to ascertain the condition of any property as to taxes unpaid, this shall be a bar to any re-assessment of such property under this law for any years prior to the date of such certificate, or such examinations; provided, that the property referred to, when re-assessed, shall be held by an innocent purchaser, who has relied upon the correctness of such certificate, or the tax rolls heretofore referred to (P. 658).

Art 7348. List to operate a lien

The said list, when complete in all respects, and filed with the tax collector, shall constitute a valid lien against all the properties mentioned in said list for the full amount of taxes, penalties, officers costs, advertising and six per cent interest from the date of said list to the date of the payment of the full sum due on each separate piece of property. A copy of said list and all cancellation orders shall be furnished to the Comptroller, and a copy filed with the county clerk (P. 659).

Art. 7349. To be advertised

The commissioners court shall proceed to have such list of properties advertised in the manner provided in Article 7323 after which, suit may be filed in the same manner as provided by law for the enforced collection of delinquent taxes (P. 659).

Art. 7350. Assessments reduced

In all cases of delinquent taxes of unrendered and unknown property, where there appears to be an assessment of the same at a valuation excessive and unreasonable, the

commissioners court shall be authorized to correct or reduce such values on the request of the tax collector with a full statement of the facts in each case; which statement and the action had thereon and the name of each commissioner voting for or against the reduction in valuation asked for shall be entered upon the minutes of the court; and a certified copy of the action had thereon shall be furnished to the Comptroller, and, when the values are so corrected or reduced, payment of taxes shall be accepted in accordance with such reduction, to which shall be added interest, penalty, advertising and costs as provided by law (P. 659).

Art. 7352. Delinquent tax record published.

The various counties which have not heretofore made and published a delinquent tax record, under provisions of chapter 103, acts of the regular session of the twenty-fifth legislature, are hereby authorized and it shall be their duty to make and publish the same to-date hereof, and, when so done, it shall have the same force and effect as if made and published under that Act; and any county which has heretofore made a delinquent tax record for any number of years is hereby authorized and empowered to recompile the same to date hereof, and may compile each year thereafter under the provisions of said act (P. 660).

Art. 7353. Property listed by Comptroller.

Whenever it shall appear to the Comptroller from an inspection of the tax rolls of any county or otherwise, that any lands in such county subject to taxation have not been assessed for taxation for any year since and including the year 1900, he shall make a list of such lands and send the same to the tax assessor of such county by registered letter,

accompanying such list with instructions to such tax assessor to assess such lands for taxes for the years for which they have not been assessed as shown by said list (P. 660).

Art. 7354. List to be posted

Upon receipt of such list, the tax assessor shall immediately post a copy of such notice and list at the court house door of his county, noting upon such copy the date of such posting; and the owners of the lands embraced in such list shall have the right, at any time within twenty days of such posting, to render the same to the tax assessor for the taxes for the years for which they have not been assessed for taxes, or for any of such years as shown by such notice, in the same manner as is provided for the rendition of other property for taxes under the provisions of the general laws for that purpose (P. 661).

Art 7355. Unrendered lands assessed

Should any of the said lands remain unrendered by the owners or owner thereof, under the provisions of the preceding article for any of the years for which the same have not been assessed according to said notice, and lists for 20 days after the date of the posting of such notice; it shall be the duty of the tax assessor, immediately upon expiration of such time, to assess for taxes at their true value such lands so remaining unrendered and unassessed for each of the years since and including the year 1900, and including the year such lists are made up by the Comptroller, listing the same in the name of unknown owners, and charging up to said lands the taxes, State and county, for which they are liable for each of such years, valuing such lands at their true and full value as provided in Article 7174. If any of said lands are lands purchased from the State as belonging to the school fund, the University, or any of the asylums of the State, and held under such contract or

purchase upon which a part of the purchase money is still due, such lands being unpatented, no deduction shall be made in the value of said lands for, or on account of, such unpaid purchase money, but they shall be valued at their full and true value as though paid out and patented (P. 661).

Art. 7356. Duty of Commissioners court

The tax assessor shall make up lists showing assessments, and deliver the same to the county judge, who shall at once, unless a regular session is held within ten days thereafter, call a meeting of the commissioners court in special session, as a board of equalization for the purpose of passing upon said assessment lists in the manner provided in case of regular assessments in so far as the provisions of the statute with regard thereto are applicable. The commissioners court without delay shall act upon said supplimental assessment lists, as to the value of the property embraced, and, when said values have been equalized as required by law, approve the same, and approve the rolls made up by the tax assessor in accordance therewith; provided, that the commissioners court shall have no authority to alter said assessment lists, or in any way interfere with such assessments, except as to the values of property embraced therein, in equalizing the same as provided by law, and to strike therefrom any lands that have been already assessed for taxes at their true market value for the years for which they are assessed on said supplemental rolls and such taxes paid (P. 661).

Art. 7357. Supplemental tax rolls

After such supplemental assessment lists have been passed upon by the board of equalization as herein provided, supplemental tax rolls shall be prepared by the tax assessor and approved by the commissioners court as is required

by law in case of the regular assessment for taxes; and as is required by law in case of the regular assessment for taxes; and thereafter the taxes due according to such supplemental rolls shall be collected as in case of other taxes, and, if not paid, such proceedings shall be had for their collection as in case of other taxes (P. 662).

Governing Procedural Rule

(From 1. Vernon's Annotated Texas Rules of Civil Procedure pp. 396 et seq., superseding statutes to the extent of conflict. The rule is reproduced as it read at the time of foreclosure. See Note P. 404.)

Rule 117a. Citation in Suits for Delinquent Ad Valorem Taxes

In all suits for collection of delinquent ad valorem taxes, the rules of civil procedure governing issuance and service of citation shall control the issuance and service of citation therein, except as herein otherwise specially provided.

1. Personal Service: Owner and Residence Known, Within State:

Where any defendant in a tax suit is a resident of the State of Texas, and is not subject to citation by publication under subdivision 3 below, and process shall conform substantially to the form hereinafter set out for personal service and shall contain the essential elements and be served and returned and otherwise regulated by the provisions of Rules 99 to 107, inclusive.

2. Personal Service: Owner and Residence Known, Out of State:

Where any such defendant is absent from the State or is a nonresident of the State and is not subject to citation by

publication under subdivision 3 below, the process shall conform substantially to the form hereinafter set out for personal service and shall contain the essential elements and be served and returned and otherwise regulated by the provisions of Rule 108.

3. Service by Publication: Nonresident, Absent from State, Transient, Name Unknown, Residence Unknown, Owner Unknown, Heirs Unknown, Corporate Officers, Trustees, Receivers or Stockholders Unknown, Any Other Unknown Persons Owning or Claiming or Having an Interest:

Where any defendant in a tax suit is a nonresident of the State, or is absent from the State, or is a transient person, or the name or the residence of any owner of any interest in any property upon which a tax lien is sought to be foreclosed, is unknown to the attorney requesting the issuance of process or filing the suit for the taxing unit, and such attorney shall make affidavit that such defendant is a nonresident of the State, or is absent from the State, or is a transient person, or that the name or residence of such owner is unknown and cannot be ascertained after diligent inquiry, each such person in every such class above mentioned, together with any and all other persons, including adverse claimants owning or claiming or having any legal or equitable interest in or lien upon such property, may be cited by publication. All unknown owners of any interest in any property upon which any taxing unit seeks to foreclose a lien for taxes, including stockholders of corporations — defunct or otherwise — their successors, heirs, and assigns, may be joined in such suit under the designation of "unknown owners" and citation be had upon them as such; provided, however, that record owners of such property or

of any apparent interest therein, including, without limitation, record lien holders, shall not be included in the designation of "unknown owners"; and provided further that where the rendition or assessment list in the assessor's office shows the address of any record owner, citation of such record owner may not be had by publication or posting unless the party applying therefor shall first make affidavit that he has caused citation to issue for personal service on such defendant at the address shown on said rendition or assessment list and has attempted to secure service thereof, but has been unable to do so. Where any attorney filing a tax suit for a taxing unit, or requesting the issuance of process in such suit, shall make affidavit that a corporation is the record owner of any interest in any property upon which a tax lien is sought to be foreclosed, and that he does not know, and after diligent inquiry has been unable to ascertain, the location of the place of business, if any, of such corporation, or the name or place of residence of any officer of such corporation upon whom personal service may be had, such corporation may be cited by publication as herein provided. All defendants of the classes enumerated above may be joined in the same citation by publication.

An affidavit which complies with the foregoing requirements therefor shall be sufficient basis for the citation above mentioned in connection with it but shall be held to be made upon the criminal responsibility of affiant.

Such citation by publication shall be directed to the defendants by names or by designation as hereinabove provided, and shall be issued and signed by the clerk of the court in which such suit is pending. It shall be sufficient if it states the file number and style of the case, the date of the filing of the petition, the names of all parties by name or by designation as hereinabove provided, and the court in which the suit is pending; shall command such parties

to appear and defend such suit at or before 10 o'clock a.m. of the first Monday after the expiration of forty-two days from the date of the issuance thereof, specifying such date when such parties are required to answer; shall state the place of holding the court, the nature of the suit, and the date of the issuance of the citation; and shall be signed and sealed by the clerk.

The citation shall be published in the English language one time a week for two weeks in some newspaper published in the county in which the property is located, which newspaper must have been in general circulation for at least one year immediately prior to the first publication, and shall in every respect answer the requirements of the law applicable to newspapers which are employed for such purpose, the first publication to be not less than twenty-eight days prior to the return day fixed in the citation; and the affidavit of the editor or publisher of the newspaper giving the date of publication, together with a printed copy of the citation as published, shall constitute sufficient proof of due publication when returned and filed in court. If there is no newspaper published in the county, then the publication may be made in a newspaper in an adjoining county, which newspaper shall in every respect answer the requirements of the law applicable to newspapers which are employed for such a purpose. A maximum fee of two cents per word for the first insertion and one cent per word for the second insertion may be taxed for publishing the citation, but in no event shall the fee exceed the published word or line rate of that newspaper for like classes of advertising. If the publication of the citation cannot be had for this fee, chargeable as costs and payable upon sale of the property, as provided by law, and this fact is supported by the affidavit of the attorney for the plaintiff or the attorney requesting the issuance of the process, then service of the citation may be

made by posting a copy at the courthouse door of the county in which the suit is pending, the citation to be posted at least twenty-eight days prior to the return day fixed in the citation. Proof of the posting of the citation shall be made by affidavit of the attorney for the plaintiff, or of the person posting it. When citation is served as here provided it shall be sufficient, and no other form of citation or notice to the named defendants therein shall be necessary.

4. Citation in Tax Suits: General Provisions: (The text of this part of the rule is not relevant.)

5. Form of Citation by Publication or Posting: (The text of this part of the rule is not relevant.)

6. Form of Citation by Personal Service in or out of State: (The text of this part of the rule is not relevant.)

APPENDIX B — Opinions and Orders Below

1. *Finding of Fact and Conclusions of Law in the Trial Court:*

The following Findings of Fact and Conclusions of Law are made by the Court:

Findings of Fact

I

This action is a suit to set aside a tax judgment and the sale thereunder. The sale was made April 3, 1951, under a judgment entered in this court in Cause No. 5806, covering the oil, gas and other minerals in and under what is known herein as Section 35, Koch Subdivision in Jackson County, Texas. A fuller description of such property is found in the judgment.

There was introduced in evidence the following papers in said tax suit:

1. Original Petition;
2. Citation to Palacios Independent School District and Return thereon;
3. Affidavit of the County Attorney for Citation by Publication;
4. Citation by Publication, together with Return and Publisher's Affidavit;
5. Another Citation by Publication, Return thereon, and Publisher's Affidavit;
6. Disclaimer of School District;
7. Order re: appointment of attorney ad litem;
8. Answer of attorney ad litem;
9. Judgment of the Court;
10. Statement of Facts;
11. Order of Sale and Return thereon;
12. Sheriff's Deed.

These speak for themselves and, by agreement of the parties, rather than incorporate them in the Findings of Fact, they will be referred to by reference.

II

No additional pleadings and no additional affidavits or citations issued to any of the parties defendant (with the exception of the School District) other than the citations by publication above referred to are shown among the papers now on file in said tax suit. The said affidavit of the County Attorney was the only affidavit filed and on which the citation by publication was issued and published.

III

The County Attorney, when he received the statement from the Tax Collector made the basis of the tax suit, made no personal investigation of the tax records to determine whether personal service could be had on defendant. The County Attorney did write to the State authorities of Minnesota, seeking to find the address and nature of the Mineral Holding Trust. He had obtained the address "St. Paul" from the deed into the Mineral Holding Trust, dated May 20, 1921, as same is found in the deed records. The County Attorney was advised by such authorities that there was no record of the nature of the concern or its address as shown by the correspondence between them in the statement of facts. Whereupon the County Attorney made the affidavit introduced in evidence.

IV

I find as a fact that Mineral Holding Trust of St. Paul, Minnesota, was the record owner of an undivided one-half (½) mineral interest in Section 35 of the Theo F. Koch Subdivision of Jackson County, Texas and had been such owner from the 20th day of May, 1922, and has been continuously such owner since the 20th day of May, 1922, as shown by deed which it filed for record August 29, 1922, and recorded in Vol. 46, Page 533, of the Deed Records of Jackson County, Texas.

V

I find that S. J. Cocklin, one of the Trustees of Mineral Holding Trust, and Grant Van Sant, another Trustee of Mineral Holding Trust, both made separate renditions of said one-half (½) mineral interest for the years 1937, 1938 and 1939, but no taxes were paid for said years until April 22, 1941, when S. J. Cocklin, one of such Trustees, paid the taxes for said years and obtained a redemption certificate for said three years' delinquent taxes.

VI

I find as a matter of fact that on April 22, 1941, S. J. Cocklin, one of the Trustees of said Mineral Holding Trust, paid taxes for the year 1940 before they became delinquent, and was issued a supplemental tax receipt for said year 1940.

VII

I find that the redemption receipt issued to Mineral Holding Trust on April 22, 1941, gave the following address: "care of S. J. Cocklin, 1973 St. Anthony Avenue, St. Paul, Minnesota" and that the widow of S. J. Cocklin still lives at said address in St. Paul, Minnesota, and has continuously resided at such address since the 22nd day of April, 1941.

VIII

I find that on October 5, 1950, in Cause No. 5806 on the docket of the District Court of Jackson County, Texas, the County Attorney for Jackson County, Texas, for the year 1950, filed suit for the State of Texas, Jackson County, Common School District No. 12 and Road District No. 11, for delinquent taxes for the years 1922 to 1935 inclusive, and for the years 1940 to 1949 inclusive, alleging that there was a total of $187.82 due such plaintiffs in the tax suit, and

further alleged that there was no interest, penalty and costs due in said tax suit.

IX

I find that the property alleged to be delinquent in said tax suit was described only as follows:

"An undivided one-half (½) mineral interest, being an undivided one-half (½) of all minerals in and under, Section No. 35 of the Theo F. Koch Subdivision, in Jackson County, Texas, which said Section 35 comprises 640 acres of land."

X

I find that said property was described in the Order of Sale, and subsequent Sheriff's Tax Deed hereinafter mentioned, identically as the same was described in the original petition in said Cause No. 5806.

XI

I find that no other character of service was had upon the record owner, Mineral Holding Trust, or any of its Trustees other than the citation by publication based upon the affidavit of the County Attorney for citation by publication.

XII

I find as a fact that the record owner was cited as a defendant whose residence was "unknown" and not as a "non-resident defendant."

XIII

I find that the tax collector's list and renditions for the years 1937, 1938 and 1939, which record showed the taxes had been paid after delinquency and a delinquent tax redemption receipt issued, disclosed an address of the Mineral Holding Trust, or of the representative of said Trust.

XIV

I find as a fact that the County Attorney did consult the deed records which showed the record owners to be Mineral Holding Trust of St. Paul, Minnesota.

XV

I find that S. J. Cocklin, one of the principal Trustees, had received a letter dated March 13, 1941, from Chas. A. Mitchell, Tax assessor-collector of Jackson County, Texas, for said year, advising S. J. Cocklin as follows:

"Prior to 1936, no effort was made by Jackson County to assess mineral, royalty or lease values; therefore, I do not feel that you are liable for taxes for the years prior to 1936."

XVI

I find that S. G. Sample, an attorney of Edna, Texas, requested Claudius Branch, tax assessor-collector of Jackson County, Texas, to figure up the delinquent taxes on said property for the years 1922 to 1949 inclusive, and also requested the County Attorney to file suit for delinquent taxes on such one-half mineral interest. In so requesting both the tax assessor-collector and the County Attorney, he was acting as attorney for the defendant in this case, Guy F. Stovall.

XVII

I find that the defendant, Guy F. Stovall, and the defendant, F. E. Appling, in view of their mutual business relationships, and as testified by both, that Guy F. Stovall had in mind buying a one-half mineral interest in the subse... tax sale for himself and partner, F. E. Appling, and through his lawyer so advised the County Attorney, and that defendant F. E. Appling, is charged with all the notices and actions of defendant, Guy F. Stovall.

I find that said one-half mineral interest owned by Mineral Holding Trust had never been rendered for taxes for any of the years sued for, except the years 1936 to 1940, inclusive, for which years the taxes had been paid, and that such property had never been placed upon the delinquent tax rolls for any of said years for which the said taxes had been paid, and was not listed on any current tax roll, and, in fact, no attempt had never been made to assess such property prior to the time that the tax assessor-collector was requested by Mr. S. G. Sample, the attorney for Guy F. Stovall, to figure up the delinquent taxes.

XIX

I find that the State of Texas sued for and judgment was awarded for the Taxes for the year 1940, which had been paid.

XX

I find that the State of Texas was awarded judgment for taxes for the years 1923 to 1949 inclusive, and for the amount of $187.82, which amount included the calculated taxes for the year 1922, but judgment was not awarded for taxes for the year 1922.

XI

I further find that such property was sold by order of sale burdened with printer's fees for two separate citations by publication, one for three weeks and one for four weeks, and that the third week's publication coincided with the first three weeks of the four week's publication, and that a fee of $26.00 was charged for the three weeks publication and a fee of $30.00 was charged for the four weeks publi-

cation, making a total of $56.00 for seven weeks publication of citation by publication.

XXII

I find as a fact that the present suit of plaintiffs' is a direct and not a collateral attack on the tax suit judgment rendered by this court on January 17, 1951, in Cause No. 5806 in the District Court of Jackson County, Texas.

XXIII

At the tax sale the property was struck off to the defendant Stovall for the benefit of himself and his co-defendant Appling, they then being owners of the surface and the remaining one-half interest in the minerals in said Section 35. The consideration paid was $400.00. I find from the evidence adduced on this trial, however, that the reasonable market value of the one-half mineral interest as of the date of such sale was $5,000.

XXIV

The Mineral Holding Trust was the record owner of the undivided one-half interest sold under said tax sale. The Declaration of Trust, dated April 15, 1922, is in evidence and, under agreement of parties, is incorporated by reference. The Trustees, under the trust instrument, are authorized to sue and also to make conveyances, including oil, gas and mineral leases. The trust instrument was never recorded in Jackson County until after the filing of this suit.

XXV

As to such Mineral Holding Trust, the evidence shows that the same was organized in 1922, primarily by one Grant Van Sant of St. Paul, Minnesota. Van Sant, through

a corporation, was engaged in lending money on real estate. He organized the Mineral Holding Trust to take title to minerals. These reservations were made not only in Texas but in other states, particularly Montana, North Dakota and South Dakota. Four of the remaining trustees were employees of Van Sant. Van Sant himself and an associate, S. J. Cocklin of St. Paul, were the remaining trustees. The trust instrument provided for the issuance of 5,000 shares or certificates of interest, but only 663 are now outstanding. Of these Cocklin owned 600. One of the trustees, Mr. Beddall, then attorney for Van Sant and now attorney in St. Paul for the novelty publisher, Bigelow and Brown, owned 9 shares and the remaining trustees a fewer number.

In December, 1941, as appears from records found in the files of Cocklin, Van Sant surrendered all interest in the Mineral Holding Trust. Cocklin thereafter, up to his death, looked after the activities of such concern. Cocklin died, however, in 1942. After the death of Cocklin said concern became wholly inactive; had no money; paid no taxes on the land it owned in Texas or elsewhere; had no trustees or stockholders meetings; no records or books except such as might be found in Mr. Cocklin's personal files; and no office or telephone.

XXVI

In 1935 the defendants Stovall and Appling became interested in acquiring the surface and one-half the minerals from the then record owners, other than Mineral Holding Trust, in Section 35, and likewise became interested in acquiring the one-half interest owned by the Trust. Stovall wrote a letter addressed to the Mineral Holding Trust in St. Paul, which was answered by S. J. Cocklin, as a trustee of the Trust, giving his then address as 832 Holly Avenue,

St. Paul, Minnesota. One or two letters passed between them, which are in evidence, but no sale was effected.

Stovall and Appling, having acquired the surface and remaining mineral estate, again, in 1949, extending into 1950, sought to contact the Trust with a view to acquiring its interest in the minerals. These negotiations were through a third party living in Texas, who was in St. Paul. This third party was referred to an attorney in St. Paul by the name of Dowd. This attorney advised, after an investigation, that so far as he could ascertain, there was no one in a position to make a conveyance, but that he would make further inquiries. This information was communicated to Stovall. This was some time prior to the filing of the tax foreclosure suit. Mr. Dowd actually contacted Mr. Beddall, who testified, however, that he was not interested in making the sale. Later, a letter addressed to Mr. Dowd by Stovall, inquiring whether Dowd had been able to contact parties who were in a position to make a sale, remained unanswered. The testimony of Beddall as to the payment of any taxes on the Trust's interest subsequent to Cocklin's death in 1942 is in the statement of facts. When Dowd contacted Beddall in 1950 the whereabouts of the original trust instrument was not known nor was a copy then known to exist. It was also thought that there remained only two surviving trustees, namely, Mr. Beddall and Mr. Richardson. Mr. Boecher, then thought to be dead, was later found to be alive.

XXVII

After the 1935 correspondence with Stovall, Cocklin, in March, 1941, wrote the then Tax Assessor and Collector of Jackson County, Texas, to ascertain what taxes were due on the property of the Trust. The Tax Collector replied that the taxes were due for the years 1937, 1938 and 1939,

but that he did not feel that taxes should be paid for prior years as it had not been customary prior to 1936 to assess non-producing minerals in Jackson County. Meanwhile certain renditions had been made, some by Grant Van Sant individually and some by S. J. Cocklin, acting for Mineral Holding Trust, as follows:

Plaintiffs' Exhibit 46 — 1936 rendition for Mineral Holding Trust, c/o S. J. Cocklin, Trustee, 832 Holly Aveinue, St. Paul. The value is stated as $160.00 and is unchanged.

Plaintiffs' Exhibit 40 — the 1937 rendition for Mineral Holding Trast, c/o S. J. Cocklin, trustee, 832 Holly Avenue, valued at $160.00, changed to $320.00.

Plaintiffs' Exhiibit 35 — the 1938 rendition for Mineral Holding Trust giving the address of: "394 Montague Place. St. Paul, Minnesota, by S. J. Cocklin, a trustee of said Trust." The value is $320.00, unchanged.

Plaintiffs' Exhibit 38 — the 1939 rendition for Mineral Holding Trust (S. J. Cocklin, trustee), 394 Montague Place. The value is $320.00, stricken through and changed to $640.00.

Plaintiffs' Exhibit 34 — the 1937 rendition by Grant Van Sant, Cove Springs, Florida, valuded at $320.00.

Plaintiffs' Exhibit 36 — the 1938 rendition by Grant Van Sant, Cove Springs, Florida, valued at $40.00, changed to $320.00.

Plaintiffs' Exhibit 37 — the 1939 rendition by Grant Van Sant, Hotel Plaza, New York, value $50.00, changed to $320.00.

In April, 1941, Mineral Holding Trust, through S. J. Cocklin, with address given as 1973 St. Anthony Avenue, St. Paul, Minnesota, redeemed the taxes on the one-half interest in the minerals here involved for the years 1937, 1938 and 1939. These had become delinquent on the regular tax rolls. At the same time the taxes for the year 1940 were

paid before delinquency by Cocklin for the Trust. The receipt also shows the 1940 taxes to have been paid by the Trust with no address given. Taxes for 1936 were paid before they became delinquent. The supplemental roll itself for 1940 gives no address. It does show the redemption receipt number.

The regular tax rolls for the years 1936 and 1937 give the address of the Mineral Holding Trust as 832 Holly Avenue, St. Paul, Minnesota, and 1938 and 1939 as 394 Montague Place. No rendition or payment of taxes were made by the Trust after payments referred to in April, 1941.

XXVIII

Thereupon the Tax Assessor and Collector prepared a statement, which formed the basis for the tax suit, setting out the details found in the original petition, and furnished the same to the County Attorney. He did not extend these calculations upon his regular rolls as such until after the tax suit and sale, but later did extend them on the supplemental rolls, and the same, as included in his monthly and final reports of moneys collected, were approved by the Commissioners' Court, and the required copies thereof were furnished to the Comptroller of the State. The value placed on the minerals was the basis of the values fixed for the years 1936 to 1939, respectively.

The information furnished the County Attorney was on a form furnished by the State Comptroller and was the customary form used by the Tax Assessor and Collector in furnishing information to the County Attorney as the basis for tax suits.

Included in such information, as being delinquent, were the taxes for 1940. The Tax Collector, through oversight, did not discover the fact that said taxes had been paid. They had gone on one of the numerous supplemental rolls, but

not on the regular rolls, and he did not discover the fact of their payment by an examination of his supplemental rolls.

XXIX

A few months after the tax sale and at about July and August, 1951, Alcoa Mining Company (Predecessor of defendant, Aluminum Company of America), acting for itself and Crown Central Petroleum Corporation, while engaged in certain geophysical work on nearby properties to Section 35, secured from the geophysical company doing the work advice that there was an indication that there was a possible change in the structure which might affect the nearby area, which turned out finally to be approximately 6,000 acres. Section 35 was a part on the southern edge. Thereupon, said Alcoa Mining Company caused further geophysical work to be done in said 6,000-acre area or block, and after consulting Crown Central Petroleum Corporation, about August 1, 1951 concluded to assemble what is known as a lease block, that is to say, to accumulate oil, gas and mineral leases in said block.

XXX

It is customary in assembling such lease blocks to secure the services of a third party who shall take leases in his own name. Alcoa, through a third party with whom Alcoa had previously had dealings, learned that the defendant Appling was a substantial land owner in the lease block and that he was experienced in assembling leases. Alcoa thereupon contacted the said Appling and worked out an arrangement with him, the terms of which are evidenced by a letter introduced in evidence. Appling was further employed to seek to secure leases from other land owners in the area, offering them first $10.00 an acre as a bonus,

subject to a 1/8th royalty, and, if necessary, to pay as high as $20.00 per acre. Many of these other land owners were non-residents, some living in the neighborhood of St. Paul, Minnesota. Appling was also to receive for his services a 1/48th overriding royalty on all leases acquired, except those of Appling or Stovall, and to receive expenses, plus 50 cents an acre. The leases made by Stovall and Appling to Alcoa Mining Company was introduced in evidence, and by agreement of the parties is made a part hereof by reference.

XXXI

In these negotiations Appling informed Alcoa in August of 1951 that in respect to a one-half interest in the minerals in Section 35, he and Stovall had recently acquired the same at the tax sale above referred to; that the 2-year period of redemption had not expired, and that a well should not be drilled on Section 35 pending such redemption period. Upon inquiry of Alcoa, Appling informed Alcoa that the defendant in said tax sale, Mineral Holding Trust, was a defunct concern, that efforts to find out about the concern and who could speak for it had been fruitless, and that apparently its affairs had been taken over by some bank or trust company which, in turn, had failed, and that there was no way to contact it.

XXXII

Alcoa then set about to and did succeed in assembling the lease block, consisting of numerous leases. Later, in September, 1953, it was drilling a well within said block by Alcoa and Crown Central, at a distance of something like three-quarters of a mile north of Section 35, and said well, at approximately 8500 feet, was brought in as a producer in paying quantities of gas and distillates in October, 1953.

XXXIII

The plaintiff Wherry is a lawyer of some years standing and a member of the State Bar. He has not been active as a lawyer for several years, but has rather been engaged in the oil business with the plaintiff Green. Upon gaining information that the Alcoa well indicated the possibility of production, plaintiffs Wherry and Green sent a man to Jackson County to search the records in respect to lands in the area of the well. This man had previously worked in a tax collector's office. He learned of the existence of the tax suit, of the existence of a lease from Appling and Stovall to Alcoa, the terms of such lease. He also investigated the tax records in the tax collector's office and learned the address of S. J. Cocklin as St. Paul, Minnesota, as appeared from some of the records set out above. The information being furnished to Wherry and Green, they caused a third party in their employ to go to St. Paul in an effort to seek the said Cocklin. Through the telephone directory they located Mrs. Cocklin, who referred them to Mr. Dowd. Mr. Dowd, however, being away, request was made that Dowd contact Wherry and Green if and when he should call in to his office. This contact by Dowd was not made.

Later Wherry and Green (who lived at Houston) learned that Alcoa actually had a promising producing sand. Whereupon, shortly before September 29, 1953, Wherry caught a plane to New York in an effort to contact Dowd. Mr. Wherry had meanwhile obtained a certified copy of the proceedings in the tax suit, No. 5806, which he took with him. He did contact Mr. Dowd in New York who, in turn, referred him to Mr. Beddall in St. Paul. Whereupon, Wherry flew to St. Paul, located Mr. Beddall and, through him, Mrs. Cocklin. He remained there several days, and there was an oral agreement that for $5,000 cash Mineral Holding Trust

would convey to C. A. Green (for the benefit of Wherry and Green) an undivided one-half of the one-half mineral interest and a 10-year paid up oil, gas and mineral lease providing for 1/8th royalty, said lease to continue so long as a paying production be had on the property. (Said mineral deed and said lease were offered in evidence, and same are incorporated by reference herein by agreement of the parties.) It was further agreed that said deed and lease when executed would be attached to a 15-day sight draft drawn on Green through the Second National Bank, Houston, Texas. Said lease and deed are dated September 29, 1953, and were attached to the draft, the draft being paid within the said 15-day period.

XXXIV

At the time Mr. Wherry was in St. Paul the original Declaration of Trust was still missing, but Mr. Beddall found attached to his certificate what he thought was a substantial copy thereof. The original Declaration of Trust was not found until some months after the institution of the suit.

XXXV

In the negotiations leading up to the oral agreement to make the mineral deed and lease, Mr. Wherry informed Mr. Beddall and Mrs. Cocklin (they being the two parties with whom he negotiated) that there were oil prospects. He did not mention the Aluminum Company, Crown Central Petroleum Corporation or the Alcoa Company. Mr. Wherry also told them that there was a tax deed, and that something had to be done within the immediate future. The Company and Mrs. Cocklin were without funds (as Mr. Wherry had there learned), and they decided therefore to take $5,000. There was no agreement as to who would pay

the expenses of lawyers if a suit should be necessary. Mr. Wherry testified that he did not know at that time whether a suit would be necessary. It was understood that the conveyance and mineral lease would be without warranty of title on the part of the Mineral Holding Trust, and the warranty provisions were stricken out.

XXXVI

The case went to trial October 18, 1954, on amended original petition. In the original petition filed November 5, 1953, plaintiffs tendered into court $400.00. The State was not made a party. (I conclude, however, that it was not necessary that it be made a party.) The evidence showed that Alcoa and Crown Central paid $20.00 an acre as a bonus for the lease from Stovall and Appling, and such was an adequate consideration therefor. In the third amended original petition plaintiffs for the first time offered to pay this, if equity required, and at the same time asserted a right to be subrogated to the rights of the other defendants under the warranty of Stovall and Appling made in the lease to Alcoa. On this matter the pleadings speak for themselves.

Conclusions of Law

I

I conclude the plaintiffs are not entitled to recover.

II

I conclude that plaintiffs' suit, being in the nature of a bill of review, is a direct and not a collateral attack on the judgment in the tax suit, No. 5806, and the Sheriff's sale made thereunder.

III

I conclude that plaintiffs have failed to show that the citations by publication issued in Cause No. 5806 on the affidavit of the County Attorney are invalid and failed to show that defendants in said tax suit were not properly in court in that connection.

IV

I conclude that the matters in issue in such tax suit were duly ruled upon and adjudicated by the court, as shown by the order of appointment of the attorney to represent defendants, the decree of court entered in that cause and the approved statement of facts. In this connection I am of the opinion that the manner of calculating and the attempted re-assessment of the taxes by the Assessor-Collector, when the Tax Assessor-Collector was asked to do such by Judge Sample, as attorney for Stovall, was not, as a fact, in full compliance with the tax statutes. But I conclude that this is not a matter which will affect the court's ruling in the present case, since the question of the taxes being due and delinquent was adjudicated in the tax suit, No. 5806, and the court will not go back of that ruling at this time.

V

I further conclude that the contention that the judgment awarded excessive taxes, including at least one year that the taxes had been paid, is not a matter to be decided upon in this action, since the same has already been passed upon and the judgment entered in tax suit No. 5806. And the same conclusion is made in respect to the contention that there was an excessive award of court costs, fees of officers, etc. I am of the opinion that these are matters that are not the subject of litigation now, having been determined in the tax suit.

VI

I conclude that the description of the land in the judgment, order of sale and sheriff's deed is sufficient.

Signed and approved December 6, 1954.

Howard P. Green
Judge.

Additional Findings and Conclusions

To the end that the courts of appeal may have my findings and conclusions in respect of all issues, I make the following additional findings and conclusions:

1.

I conclude that Stovall and Appling are not entitled to be considered as innocent purchasers for value, in view of the mutual business relations of Mr. Stovall and Mr. Appling with each other, as testified to by both. In my opinion each is chargeable with the information and the actions of the other in connection with this property, and everything having to do with it, as brought out by the testimony in the case. I find that the tax suit was originally brought at the instance and request of Mr. Stovall. He theretofore had been in correspondence with S. J. Cocklin, the principal trustee of the Mineral Holding Trust, several years before, at the address 832 Holly Avenue, St. Paul, Minnesota, and could have furnished the Holly Avenue address to the County Attorney but did not. At the time of suggesting suit, Stovall had in mind buying the one-half mineral interest at the subsequent sale for himself and his partner, Mr. Appling, and through his lawyer so advised the County Attorney. It is my opinion, formed from the evidence, that one-half of the mineral interest in this sec-

tion of land, situated in South Jackson County as it was, had a cash market value on April 3, 1951, far above $400.00, which was the purchase price at the tax sale. In fact, from the evidence, I place a reasonable market value on said interest at said time as being $5,000. From all the evidence, I find as a fact that if I am wrong in my original ruling on sufficient service on defendants in the tax suit, the validity of that tax judgmeent, I would not consider Mr. Stovall and Mr. Appling as being innocent purchasers for value.

2.

As to the corporate defendants who were not involved in the institution of the tax suit and did not take part in the tax suit at the time of its being brought or the judgment being rendered, etc., and who, at the time of securing their leases from Appling and Stovall, were not in possession of the same information concerning the Mineral Holding Trust as were Stovall and Appling, and who paid an adequate consideration for their leases, I find and consider them as being innocent purchasers for valve of their leases on this section, so that they, Crown Central Petroleum Corporation and Aluminum Company of America, should be entitled, even if I am wrong in my original holding about the sufficiency of the service by publication and the validity of the tax judgment and sale, to their equities, whatever they may be in this lease. I find them to be innocent purchasers as to all parties, and certainly I find them to have equities exceeding those of Wherry and Green.

I would hold that in this proceeding Wherry and Green are not entitled to assert the validity of the oil, gas and mineral lease obtained by them from Mineral Holding Trust as against the rights of Aluminum Company of America and Crown Central Petroleum Corporation under their

lease from Stovall and Appling. The facts as set forth in the Findings of Fact, inclusive of additional findings, are such as to place them in no position to resort to such relief in this suit.

2. *Opinion of the Court of Civil Appeals (reported in Volume 288 of Southwestern (2d) at Page 819)*

Reversed and rendered, Associate Justice Gannon not sitting, and opinion filed March 1, 1956.

No. 12,841

MINERAL HOLDING TRUST, ET AL,

Appellants,

v.

GUY F. STOVALL, ET AL,

Appellees.

APPEAL FROM THE DISTRICT COURT OF JACKSON COUNTY.

This suit was instituted in the District Court of Jackson County by appellants to cancel and set aside the order of sale, sheriff's deed and all subsequent conveyances based upon a tax foreclosure suit filed in Jackson County on October 5, 1950. Such tax suit was filed by the County Attorney in the name of the State of Texas for taxes alleged to have been delinquent for the years 1922 to 1935, inclusive, and for the years 1940 to 1950, inclusive, on one-half of the minerals in Section 35 of the Theodore F. Koch Subdivision of land in said county.

Plaintiffs in the trail court were Mineral Holding Trust of St. Paul, Minn., the record title owner at the time of the institution and rendition of the judgment in the tax suit,

and C. A. Green and R. B. Wherry, who hold under a lease and a mineral deed from Mineral Holding Trust dated respectively September 29th and September 30th of 1953.

Defendants in the trial court were Guy F. Stovall, the purchaser under the sheriff's deed sought to be set aside, F. E. Appling, Alcoa Mining Company, which holds under two mineral leases from Stovall and Appling, dated February 1, 1952, and Crown Central Petroleum Company and Aluminum Company of America, which hold under assignments from Alcoa Mining Company.

Trial was before the court without a jury, at the conclusion of which the court entered judgment denying plaintiffs any relief. Subsequent to the appeal to this Court, appellants entered into a compromise settlement of the differences between them and the appellees Stovall and Appling. Appellants now before this Court are those parties who were plaintiffs in the trial court. Appellees before this Court are Alcoa Mining Company, Crown Central Petroleum Corporation, and Aluminum Company of America.

As grounds entitling them to the relief sought, appellants filed a petition in the nature of a bill or review in which they alleged many irregularities in the proceedings in the tax suit of such nature as to render the same void and a complete nullity entitling them to a cancellation of the sheriff's deed as against all persons holding thereunder. Among such allegations were non-assessment of the property for taxes, illegal assessment of the property for taxes, non-compliance with the Rules of Civil Procedure governing citation by publication, inadequate description of the property, non-delinquency of a portion of the taxes sued for, excessiveness of the judgment for taxes, and inadequacy of the consideration for the sheriff's deed.

Appellees filed a general denial and a plea that they were bona fide purchasers without notice of the irregularities

alleged by appellants. Countering this latter plea, appellants alleged notice both actual and constructive on the part of appellees.

The trial court made numerous findings of fact, including the following: The County Attorney made no personal investigation of the tax records to determine whether personal service could be had on the defendant; Mineral Holding Trust was the record owner of the property at all material times; taxes for the year 1940 were paid before the institution of the tax suit; the tax collector's list and renditions for the years 1937, 1938, and 1939 disclosed an address of the Mineral Holding Trust; the property had never been placed on the delinquent tax roll and had never been assessed prior to the time the attorney for defendant Stovall requested the tax assessor to figure up the delinquent taxes; the consideration paid at the sheriff's sale was $400.00; the reasonable market value of the property at that time was $5,000.00; the defendant Stovall had actual knowledge of the address of Mineral Holding Trust; and by reason of business relationship, defendant Appling was charged with such knowledge.

We have stated only such findings of fact made by the trial court as we consider necessary to a proper discussion of the issues raised on this appeal. We find all of the stated findings of fact to be amply supported by the record before us. In so far as the individual defendants Stovall and Appling are concerned, our examination discloses a record replete with evidence of fraudulent practices by them of such nature as to shock the conscience of this Court. The manifest error of the trial court, in denying appellants all relief against those two defendants, and in refusing to divest them of any interest, by way of possibility of reverter, or other, as they might possess, has been rendered moot by the settlement of the differences between them and appellants.

The only justiciable issue to be determined on this appeal is the propriety of the trial court's judgment in so far as it denies to appellants any relief against the corporate defendants, who are the only appellees before this Court. Before stating our conclusions, we feel that it is appropriate to define the issue as we see it.

The findings of fact upon which the trial court's conclusions and judgment rest, are based upon evidence in the record in this appeal, which is largely aliunde the record in the proceedings in the tax suit and judgment sought to be set aside. A substantial portion of the briefs submitted to us deals with the question of whether or not this present suit is a direct, as opposed to a collateral attack upon the tax suit judgment. Appellants' argument is that this is a direct attack upon that judgment, and that consequently evidence aliunde the record in that proceeding is determinative of the rights of the parties to this appeal. Their points of error are largely so premised. With due apologies to able and distinguished counsel who so vigorously urge the controlling importance of this proposition, we state it to be our opinion that in view of the issue joined by the plea of bona fide purchaser interposed by appellees the question of whether this suit is a direct as opposed to a collateral attack is entirely immaterial.

The innocent purchaser doctrine states that the innocent purchase in good faith and for value of the legal title, cuts off all outstanding equities. In 43B Tex. Jur., page 4, Sec. 701, a bona fide purchaser is defined as one "who acquires the apparent legal title to property in good faith for a valuable consideration and without notice of a claim or interest of a third person under the common source of title." Aside from the requirement that the apparent legal title pass, the three elements essential to a bona fide purchase are:

(1) good faith, (2) a valuable consideration, and (3) absence of notice.

A bill of review is an equitable proceeding. It is a direct attack upon a judgment wherein relief from the effect of the judgment is sought upon equitable grounds. The legal requirements which must be met to entitle one to such relief are well established and need not be stated here, for the reason that it is our understanding that such equities must be asserted before the intervention of the rights of a person who occupies the status of bona fide purchaser as above defined. If before the equitable rights of a plaintiff are asserted in a bill of review, the apparent legal title has passed into one who fulfills the stated requirements of a bona fide purchaser, all equities resting in such plaintiff are cut off and are of no avail against such bona fide purchaser. *Therefore it appears to this Court that the determination of the issues on this appeal depend solely upon the question of whether or not appellees occupy the status of bona fide purchasers, and are entitled to the protection of the innocent purchaser doctrine. The discussion which follows is based upon such conclusion.*

By their point of error No. 6, appellants assert that the trial court erred in holding and concluding that the appellees were innocent purchasers as against appellants. For reasons which we will undertake to state, we conclude that appellants' point No. 6 is well taken and must be sustained. We have concluded that the defense of bona fide purchaser is not available to the appellees for two reasons: First, it is our opinion that they did not acquire the apparent legal title to the property in question, and, second, we are of the opinion that appellees are charged with notice, as a matter of law, of the invalidity of the tax title under which they hold and consequently of the claim or interest of appellants under the common source of tite.

We rest our conclusion that appellees did not acquire the apparent legal title to the property in controversy upon the proposition that the trial court did not have jurisdiction to render the judgment upon which the tax title depends. From this we further conclude that the judgment is absolutely void and is subject to collateral attack at any time. We understand it to be established law in Texas that the validity of a tax title depends upon the existence of a judgment for taxes, foreclosure of a tax lien, order of sale, and proper deed from the sheriff. *Harrison* v. *Orr*, 296 S.W. 871 (Comm. App.).

Lack of jurisdiction depends upon the absence of one or more of the following elements: (1) a legally organized court, (2) jurisdiction over the subject matter, (3) jurisdiction over the person, (4) power to render the particular relief awarded. 25 Tex. Jur., page 709, Sec. 261. There exists no doubt as to the presence of the first two elements mentioned. We do entertain doubt as to the jurisdiction of the court over the persons of the defendants in the tax suit. We entertain no doubt but that the trial court in the tax suit upon which appellees' title depends lacked jurisdiction to render the particular relief awarded, and that the absence of that element is apparent upon the face of the judgment in the tax suit.

In the tax suit, the trial court obtained jurisdiction over the person of the defendant Mineral Holding Trust, if at all, by citation by publication. The citation by publication rests for its validity upon the affidavit of the County Attorney of Jackson County, the material portion of which is as follows:

"My name is Cullen B. Vance and I am the duly elected, qualified, and acting County Attorney of Jackson County, Texas, and the attorney for plaintiff, the State of Texas, in the above entitled and numbered cause. The residence

of each of the defendants alleged in Plaintiff's Original Petition on file in the above entitled and numbered cause alleged as being 'Unknown' is in fact unknown and the parties described in said petition as the 'Unknown owner or owners' of the land described therein are also unknown, and that after due diligence and inquiry by the Tax Collector of Jackson County, Texas, and by me, as attorney for plaintiff, were not and cannot be determined and ascertained."

On the date of the institution of the tax suit, Rule 117-a, T.R.C.P., governed the procedure in tax suits. A portion of the Rule, as it then existed, provided: "and provided further that where the rendition or assessment list in the assessor's office shows the address of any record owner, citation of such record owner *may not be had by publication or posting unless* the party applying therefor shall first make affidavit that he has caused citation to issue for personal service on such defendant at the address shown on said rendition or assessment list and has attempted to secure service thereof, but has been unable to do so." The record discloses, and the trial court found, that the County Attorney made no investigation of the tax records to determine whether personal service could be had on the defendant; that Mineral Holding Trust was the record owner of the property, and that the tax collector's list and renditions disclosed an address of Mineral Holding Trust. Thus there is a manifest non-compliance with the requirements of the applicable rule. The facts which disclose such non-compliance so manifestly, however, *are aliunde the record in the tax suit.* The question is, was that non-compliance apparent on the face of the record in the tax suit so as to defeat the passage of the apparent legal title thereunder. The question must be determined within the wording of the affidavit itself.

It will be noted that Sec. 3 of Rule 117-a names those classes of defendants who may be cited by publication. The trial court found that Mineral Holding Trust was cited as a defendant whose residence was "unknown." Other defendants in the suit were cited as "unknown owners." The rule requires that the attorney requesting the issuance of process, must, as to "unknown owners," make affidavit that the name of such owner is unknown, and cannot be ascertained after diligent inquiry, and as to defendants whose residence is unknown, must make affidavit that such residence is unknown, and cannot be ascertained after diligent inquiry. In the light of these requirements of Rule 117-a, an examination of the affidavit of the County Attorney hereinabove quoted, leaves this Court in doubt as to whether, as to both unknown owners, and owners whose address is unknown, the affiant has stated that their identity, as well as address could not be ascertained after diligent inquiry. It seems to us, in view of the language employed in the affidavit, that the affiant has stated that those parties described as "unknown owners" were unknown and could not be ascertained after diligent inquiry, but as to the defendants whose residence he states to be unknown, he has said nothing more. It is possible that our construction of the affidavit is colored by our knowledge that the County Attorney did not intend to swear that the residence of Mineral Holding Trust could not be ascertained after diligent inquiry. The office of County Attorney is one of high public trust and honor. The record in this case discloses without dispute that the address of Mineral Holding Trust appeared upon the tax collector's rendition or assessment list. The requirement of Rule 117-a under such conditions has been heretofore stated. To attribute to the County Attorney an intention to swear that the residence of Mineral Holding Trust could not be ascertained after diligent inquiry would

require the conclusion either that he swore falsely, or that he deliberately violated the provisions of the applicable rule of civil procedure. In the case of an affiant such as this one, we will not entertain such a conclusion where any alternative exists. We, therefore, say that he did not intend to swear that the residence of Mineral Holding Trust could not be ascertained after diligent inquiry. We conclude that the non-compliance with the rule results from a mistake of law. These conclusions, as we have stated, may be colored by the possession of knowledge gained aliunde the record in the tax suit. We, therefore, do not base our conclusion of lack of jurisdiction in the trial court upon its lack of jurisdiction over the person of the defendant Mineral Holding Trust. We mention our doubts relative to that jurisdiction as a predicate to our discussion of the absence or presence of notice on the part of appellees of the claim or interest of the appellants, which we will discuss later.

As stated before, we have no doubt but that the trial court, in the tax suit upon which appellees' title depends, lacked the jurisdiction to render the particular relief awarded therein, and that the absence of that element is apparent upon the face of the judgment therein rendered.

Generally speaking, it may be said that failure of a court to observe a mandatory constitutional or statutory provision conferring a right or forbidding a particular action will render its judgment absolutely void while non-compliance with a mere procedural direction will render it only voidable. For instance, judgments have been held void wherein there is reflected an effort on the part of a court to alienate a homestead contrary to the provisions of the constitution and the statutes, or to render a judgment for costs against a county in the face of a law prohibiting such action. *Grant* v. *Ellis*, Comm. App., 50 S.W. 2d 1093. In the cited case, it was held that when a statute authoriz-

ing the collection of state and county taxes provides that neither the state nor the county shall in any event be liable for costs, a judgment dismissing the action and adjudging the costs against the county is void and assailable collaterally at any time. In 25 Tex. Jur., page 812, Sec. 309, the following statement is made: "Special and limited authority conferred by statute must be strictly pursued, and any judgment rendered on proceedings not had in compliance with the statute will be held void on collateral attack. Frequent application of this rule is found in cases where suits have been brought to foreclose tax liens upon real property; in such cases, the court's power is purely statutory and a judgment rendered in circumstances not contemplated is invalid."

It has been frequently held in Texas that the right to sue for delinquent taxes and to foreclose a tax lien is wholly statutory and that unless the statute conferring the right is strictly complied with, the court is without jurisdiction. *Mote et al* v. *Thompson et al*, 156 S.W. 1105, writ refused; *Hill & Jahns* v. *Lofton*, 165 S.W. 67, writ refused.

We have mentioned the foregoing statements of the law as a predicate for our reference to the record in the tax suit under attack. An examination of the judgment in that suit reflects that the court found "that the State of Texas is entitled to recover for itself and for the use and benefit of Jackson County, Texas, and the other political subdivisions * * * the sum of $187.86, being the amount of the delinquent taxes due, owing and unpaid on the hereinafter described land, *there being no penalties, interest and costs accrued owing thereon* * * *." The judgment of the court thereupon allows recovery to the State of Texas for itself and for the use and benefit of Jackson County and the other political subdivision "The sum of $187.86, being the amount of taxes due, owing and delinquent on the hereinafter de-

scribed property for the years 1923 to 1949, both inculsive, *exclusive of penalties, interest and costs, of which there are none due.*" (Emphasis added.)

It is our opinion, in the light of the legal premise that the power of a court in a tax suit is purely statutory, and from our examination of the applicable statutes conferring that power upon the courts, that there exists in our substantive law no possibility of the existence of delinquent taxes without the coincident existence of penalties and interest. This, we think, is manifest from an examination of Chapter 10, Title 122 of the Revised Civil Statutes of this State. Art. 7336 of such statutes provides the time within which a tax payer may pay taxes without penalty or interest thereon. It provides further that if any person fails to pay in the manner provided for, *penalties shall be payable* thereon in the manner set forth in the statute. Sec. (d) of the Article provides that *all delinquent taxes shall bear interest* at the rate of 6% per annum from the date of their delinquency. Sec. (e) of that Article provides that penalties, interest and costs accrued against any land need not be entered by the assessor and collector of taxes on his list, *but in each and every instance all such penalties, interest and costs shall be and remain a statutory charge with the same force and effect as if entered on said list and the assessor and collector of taxes shall calculate and charge all such penalties, interest and costs on all delinquent tax statements or delinquent tax receipts issued by him.* Article 7336 was passed by the 46th Legislature and was effective at the time of the institution of and the judgment in the tax suit here involved. It formed a part of the substantive law of this State, with knowledge of which all persons, including the appellees in this case, were charged. We say that upon the face of the judgment itself, it is apparent as a matter of law that the trial court possessed no power to render the partisular relief awarded.

Since the trial court lacked jurisdiction and since the lack is apparent upon the face of the record, the judgment is a complete nullity, absolutely void, and may be collaterally attacked at any time. We conclude that it was totally ineffective to support the sheriff's sale and deed thereunder and that the appellees did not, by their purchase under such judgment acquire legal title or apparent legal title to the property in question.

We cite no direct authority for our conclusion that the tax judgment here involved is void for want of jurisdiction. It is based upon our own construction of the applicable statutes of this State which confer upon courts the jurisdiction to render judgments in tax suits, which we think logic requires, and which appears to us to be consistent, by analogy, with the decisions of other courts of this State dealing with the same or similar types of statutory jurisdiction. We are aware that jurisdiction includes the power to decide issues erroneously as well as correctly. Able counsel for appellees argues most forcefully that the tax judgment is not void, but merely erroneous. We differ with his contention in this respect. But if it be that he is correct therein, then we say that nevertheless appellees do not occupy the status of bona fide purchasers with respect to the appellants because they are charged as a matter of law with notice of appellants' equitable rights and claim to the property.

It is a recognized rule of law that notice of a fact which would put a prudent person on inquiry as to an adverse right charges such person with notice of all facts which a reasonable inquiry would have disclosed. If, as appellees contend, the tax judgment is erroneous rather than void for want of jurisdiction, we say that in view of the clear and mandatory provisions of the tax statutes which we have referred to, it is so patently erroneous as to put

any prudent person upon inquiry as to how and in what manner there could exist a long period of delinquency in the payment of taxes, without the accrual of penalty, interest and costs. From the stated findings of fact by the trial court, which the record so amply supports, it is manifest that even the slightest inquiry would have immediately disclosed the numerous irregularities in the judgment under which appellees claim, and the outstanding equities in appellants.

We have already discussed our doubts as to the sufficiency of the affidavit of the County Attorney of Jackson County upon which the citation by publication in the tax suit depends. We do not rest our conclusion that the judgment is void for want of jurisdiction upon the deficiencies in that affidavit because of our expressed fear that our conclusion might be colored by the knowledge that the County Attorney could not have intended his affidavit to meet the full requirements of Rule 117-a, T.R.C.P. When that affidavit is viewed from the eyes of the appellees, we feel that the following facts should be considered. Appellees' purchase from Stovall and Appling was made within the two year redemption period. They were actually and constructively aware of that fact. They were purchasing a title dependent upon a judgment in a tax suit wherein the jurisdiction of the court is based purely upon statutes which must be strictly complied with. Jurisdiction of the court over the person of the defendants had been obtained by citation by publication, the procedure for obtaining which must also be strictly complied with. We say that under such circumstances the deficiencies in the affidavit, while possibly not within themselves such as to render the citation void, were certainly such as to put a prudent person upon inquiry, which if made would disclose the same irregularities and equities previously mentioned.

The requirement of good faith, which the innocent purchaser doctrine imposes, is not, in this Court's opinion, consonent with the proposition that a purchaser may blind himself to the warning flags of fraud and invalidity such as are here present, and thereafter seek to shield himself by the cloak of that doctrine. We think appellees are clearly charged with notice, as a matter of law with all facts which a reasonable inquiry would have disclosed to them, and consequently are not bona fide purchasers.

Appellants have presented eleven points of error in their brief. Many of them are premised upon the proposition that this being a direct attack upon the tax judgment, evidence aliunde the record in that suit is determinative of the rights of the parties. We have already expressed our views in that regard. In so far as appellant's points are directed to the lack of jurisdiction apparent upon the face of the tax judgment, we feel that our discussion to this point is adequate. In so far as appellants' points are directed to issues as between them and the defendants with whom settlement has been effected, such points are moot.

We are of the opinion that the trial court erred in denying to appellants the relief which they sought as against all parties defendant. We, therefore, conclude that that judgment must be reversed and such judgment as the trial court should have rendered should be here rendered. It is so ordered.

Reversed and rendered, Associate Justice Gannon not sitting.

/s/ W. P. Hamblen, Jr.
Chief Justice

Judgment rendered and opinion filed March 1, 1956.

3. *Judgment of the Court of Civil Appeals:*

No. 12841

MINERAL HOLDING TRUST, ET AL

v.

GUY F. STOVALL, ET AL

APPEAL FROM DISTRICT COURT OF JACKSON COUNTY

(Tr. Ct. No. 3762)

OPINION DELIVERED BY CHIEF JUSTICE HAMBLEN

On this day came on to be heard the request of the parties to amend the judgment of this Court in this cause, of date March 1, 1956, of record in Minute Book 13, page 496, and such request and the proposed judgment submitted by the parties having been duly considered, it is therefore considered, adjudged and ordered that the judgment of this Court, of date March 1, 1956, of record in Minute Book 13, page 496 be and the same hereby is amended to hereafter read as follows:

This cause, being an appeal from the judgment rendered and entered by the court below on November 10, 1954, came on to be heard on the transcript of the record, and thereafter it being shown to this court that the matters in controversy between the appellants and Guy F. Stovall and F. E. Appling, two ot the appellees herein, had been settled without prejudice to any rights or defenses of the appellants or of the remaining appellees as against each other, therefore, it is ORDERED, ADJUDGED AND DECREED that said Guy F. Stovall and F. E. Appling, appellees, be dismissed from this cause; and the transcript of the record being inspected, because it is the opinion of this Court that

there was error in the judgment, Associate Justice Gannon not sitting, it is therefore considered, adjudged and ordered that the judgment of the court below be reversed. And because it is further the opinion of this Court that the judgment of the court below should have been in favor of the plaintiffs, and against the defendants, and this Court here now proceeding to render such judgment as should have been rendered by the court below:

It is herenow ORDERED, ADJUDGED AND DECREED that the Sheriff's Deed from Lewis W. Watson, Sheriff of Jackson County, Texas, to Guy F. Stovall, dated April 3, 1951, of record in Volume 204, pages 373-374, of the Deed Records of Jackson County, Texas, insofar as the same conveys or purports to convey any interest in the hereinafter described property, be, and the same is hereby set aside and held for naught.

It is further ORDERED, ADJUDGED AND DECREED that the Deed from Guy F. Stovall to F. E. Appling, dated October 15, 1951, of record in Volume 210, pages 505-506, of the Deed Records of Jackson County, Texas, insofar as the same conveys or purports to convey any interest in the hereinafter described property, be and the same is hereby set aside and held for naught.

It is further ORDERED, ADJUDGED AND DECREED that the oil, gas and mineral leases from Guy F. Stovall and F. E. Appling to Alcoa Mining Company, dated February 1, 1952, of record in Volume 212, pages 377-380, and from Guy F. Stovall and F. E. Appling to Alcoa Mining Company, dated February 1, 1952, of record in Volume 216, pages 381-384, of the Deed Records of Jackson County, Texas, insofar as each or both of them conveys or purports to convey any interest in the hereinafter described property, be and the same are hereby set aside and held for naught.

It is further ORDERED, ADJUDGED AND DECREED that the assignment of an oil, gas and mineral lease from Alcoa Mining Company to Crown Central Petroleum Corporation, dated June 13, 1952, of record in Volume 218, pages 306-310, of the Deed Records of Jackson County, Texas, and the assignment from Alcoa Mining Company to Aluminum Company of America, dated May 29, 1953, of record in Volume 228, pages 171-185, of the Deed Records of Jackson County, Texas, insofar as each or both of them conveys or purports to convey any interest in the hereinafter described property, be, and the same are hereby set aside and held for naught.

It is further ORDERED, ADJUDGED AND DECREED that the cloud cast upon the title of the appellants, Mineral Holding Trust, a Trust Estate or Association, acting by and through Claude R. Beddall, Max G. Boecher, Thomas H. Richardson and Adda M. Cocklin, its duly authorized and appointed and acting Trustees, and C. A. Green and R. B. Wherry, in and to the land involved in this action, being the following described property, to-wit: An undivided one-half (½) of the oil, gas and other minerals in and under all of Section 35 of the Theo. F. Koch Subdivision of lands in Jackson County, Texas, as per plat and map of said Subdivision recorded in Volume 7, page 492, of the Deed Records of Jackson County, Texas, containing six hundred forty (640) acres of land, more or less, being the same undivided interest in the minerals owned and claimed by Mineral Holding Trust under conveyance from Grant Van Sant to Mineral Holding Trust of St. Paul, Minnesota, under deed dated May 20, 1922, recorded in Volume 46, pages 533-534 of the Deed Records of Jackson County, Texas, by any or all of the foregoing instruments insofar as they convey or purport to convey any interest in the hereinbefore described property, be, and the same is hereby removed.

It is further ORDERED, ADJUDGED AND DECREED that the judgment here rendered shall not divest or change any of the property rights or agreements vested and set out in the settlement agreement between the appellants and Guy F. Stovall and F. E. Appling, which is shown to this court to be dated September 29, 1955, and recorded in Volume 260, page 296, of the Deed Records of Jackson County, Texas.

It is further ordered that the appellees, Aluminum Company of America and Crown Central Petroleum Corporation, jointly and severally, pay all costs in this cause incurred, both in this Court and in the court below. It is further ordered that this decision be certified below for observance.

4. *Opinion of the Supreme Court:*

IN THE

SUPREME COURT OF TEXAS

No. A-5854

ALUMINUM COMPANY OF AMERICA AND CROWN PETROLEUM CORPORATION, *Petitioners,* v. MINERAL HOLDING TRUST, C. A. GREEN, R. B. WHERRY, GUY F. STOVALL AND F. E. APPLING, *Respondents.*	From Jackson County, First District

This action in the nature of a bill of review was brought by Mineral Holding Trust and its grantees and assignees, Green and Wherry, against Aluminum Company of America,

Crown Central Petroleum Corporation, and Guy F. Stovall and F. E. Appling, to set aside a sheriff's deed and the subsequently executed oil and gas lease from Stovall and Appling to petitioners based upon a tax foreclosure suit filed on October 5, 1950 and judgment for delinquent taxes on an undivided one-half mineral interest in Section 35, Theo. F. Koch Subdivision in Jackson County, Texas, which section comprises 640 acres of land.

Judgment denying the plaintiffs-respondents a recovery was on appeal reversed and rendered in their favor. 288 S.W. 2d 849. As noted in the Court of Civil Appeals opinion the respondents compromised and settled with Stovall and Appling so that the latter two no longer have any interest in the controversy. In our opinion the judgment of the trial court should be affirmed.

The Mineral Holding Trust of St. Paul, Minnesota, had owned the property described above continuously since May 20, 1922. The property was rendered for taxation for the years 1937 to 1939, inclusive, and these taxes were paid, together with those for 1940 by S. J. Cocklin, one of the trustees of the Trust. Redemption receipt issued on April 22, 1941 gave the address of Mineral Holding Trust "in care of S. J. Cocklin, 1973 St. Anthony Avenue; St. Paul, Minnesota."

Cocklin, who owned ninety per cent of the outstanding shares in this concern, died in 1942. His widow continued to reside at the above address in St. Paul up until the filing of the tax suit. After Cocklin's death the management of the Trust became inactive and no one seemed to be in charge of its affairs. It had no funds and the testimony cast considerable doubt upon its ability or that of anyone on its behalf to have paid the taxes if personal notice of the tax suit had been served. No tax had been paid on this property since 1941, nor on any other property in Texas or elsewhere owned by

the company in a number of years. On more than one occasion Stovall, the owner of the surface of and the other one-half mineral interest in Section 35, had unsuccessfully endeavored to purchase the property in controversy. He had been in correspondence with the trustee, Cocklin, and knew his street address in St. Paul and a short time before the institution of the suit Stovall had talked to a lawyer in St. Paul who purportedly represented Mrs. Cocklin.

At the request of Stovall the Tax Assessor figured up the amount of taxes due on the property for the years 1922 to 1949, inclusive, and Stovall induced the County Attorney to file the tax suit on the basis of that statement. The Mineral Holding Trust was cited by publication. The Court appointed an attorney to represent the defendant, a hearing was had and on January 17, 1951 judgment was rendered adjudging the amount of taxes due, foreclosing the tax lien and ordering the sale. Thereafter, the property was struck off to the defendant, Stovall, acting for himself and his co-defendant, Appling, for a consideration of $400.00. The tax judgment recited the value of the property to be $350.00. On the 1st day of February 1952, Stovall and Appling gave an oil and gas lease to the petitioners on this property for a consideration of $20.00 per acre, retaining a one-sixth royalty and on the same day and for the same consideration executed a lease to the petitioners on the other one-half mineral interest in the section.

Shortly after the petitioners had drilled a producing oil well in the vicinity of Section 35, the respondents, Wherry and Green, in September of 1953, procured from Mineral Holding Trust, a mineral deed to an undivided one-fourth interest and an assignment of an oil and gas lease covering the property in controversy.

The respondents assert many irregularities in the tax suit proceedings of such a nature, they say, as to render the

judgment void entitling them to a cancellation of the sheriff's deed as against all presons holding thereunder. They allege illegal assessment of the property for taxes, non-compliance with the rules of civil procedure governing citation by publication, payment of a part of the taxes before suit and inadequacy of the consideration for the sheriff's deed. Respondents further charge that petitioners had actual and constructive notice of these irregularities so that they could not be innocent purchasers. Among other findings of the trial court which will be referred to later on, the Court found that at the time of the tax sale the property was worth the sum of $5,000.00.

The contention of the respondents is that the tax judgment is void on one or all of three grounds, namely, that the Court did not have jurisdiction of the subject matter nor of the defendant, Mineral Holding Trust, nor was the Court empowered to enter the judgment that it did enter.

Respondents argue that before suit can be maintained for taxes it must appear that the taxes have been regularly assessed by the proper authorities and have become delinquent. The trial court found that the property had never been placed upon the delinquent tax rolls for any of the years for which judgment was rendered. It was not listed on any current tax rolls and no attempt had been made to assess the property for taxes prior to the time that the attorney for Stovall requested the Tax Assessor to figure up the delinquent taxes, and this for the purpose of filing a suit. As to this matter the trial court found as follows:

> "Thereupon the Tax Assessor and Collector prepared a statement, which formed the basis for the tax suit, setting out the details found in the original petition, and furnished the same to the County Attorney. He did not extend these calculations upon his regular rolls as such until after the tax suit and sale, but later did

extend them on the supplemental rolls, and the same, as included in his monthly and final reports of moneys collected, were approved by the Commissioners' Court, and the required copies thereof were furnished to the Comptroller of the State. The value placed on the minerals was the basis of the values fixed for the years 1936 to 1939, respectively."

Therefore, they say that the Court did not have jurisdiction of the subject matter in the total absence of prior and statutory levy and assessment of taxes and fixation of liens evidenced on delinquent tax rolls.

Taxes had not been paid on this property for ten years and though the proceedings were irregular, the trial court did have jurisdiction of the subject matter, the judgment was not void on that ground and the Court of Civil Appeals correctly so held. It did, however, uphold the contention of respondents that the trial court's judgment was void for the reason that it was one that the court was not empowered to render as a matter of law.

In the tax suit the trial court found that the amount of taxes due amounted to $187.86 and that there were "no penalties, interest and cost accruing or owing thereon." Judgment was then rendered as follows:

> "That the plaintiff, the State of Texas, do have and recover for itself and for the use and benefit of Jackson County, Texas, and the other political subdivisions, the taxes for which are collected by the tax collector of said county and state, particularly Road District No. 11, and Common School District No. 12, the sum of $187.86, being the amount of taxes due, owing and delinquent on the hereinafter described property for the years 1923 to 1949, both inclusive, exclusive of penalties, interest and costs of which there are none due."

The Court of Civil Appeals held in effect that, as penalties and interest accrue automatically and are necessarily

as much a part of the amount owed to the taxing authorities as the taxes themselves, the trial court was not empowered to render judgment omitting these charges that are and must become due when the taxes become delinquent. The Court decided that this rendered the judgment void and if not void it was such an irregularity on the face of the judgment as to put petitioners on notice and prevent them from occupying the position of innocent purchasers.

This holding is premised upon the theory that a suit for delinquent taxes and for foreclosure of the tax lien is wholly statutory and unless the statutory authority is strictly followed the court is without jurisdiction. In support of this conclusion there are cited the cases of *Mote, et al* v. *Thompson et al*, 156 S.W. 1105 (C.C.A.); *Hill & Johns* v. *Lofton*, 165 S.W. 67 (C.C.A.). But in *Brown* v. *Bonougli*, 111 Tex. 275, 232 S.W. 490, the holding in the latter case was expressly overruled, the opinion pointing out that the Court of Civil Appeals in that case had mistakenly followed the rule announced in *Lufkin* v. *City of Galveston*, 73 Tex. 340, 11 S.W. 340, dealing with summary tax proceedings.

In *State Mortgage Corporation* v. *Ludwig*, 121 Tex. 268, 48 S.W. 2d 950, this Court expressly holds that a tax suit does not import a special or limited jurisdiction but that judgments in such cases "are supported by all the presumptions which uphold judgments of domestic courts of general jurisdiction."

Article 7345b, Vernon's Texas Civil Statutes, is a comprehensive statute designed to facilitate the collection of delinquent taxes by suit. In Section 3 it provides "the laws governing ordinary foreclosure suits in the district courts of this state shall control the question of parties, issuance and service of process and other proceedings in tax suits save and except as herein otherwise provided." In Section 10 the Act seeks to protect the purchasers of property sold

for taxes against the claims of the taxing units for any taxes delinquent at the time of judgments that had been omitted and not sued for giving the assurance that even though the authorities sued for less than the amount of taxes due no claim could thereafter be made against the purchaser and he took the property free of all taxes and liens due to the date of the judgment.

Article 7336 provides for penalties and interest on delinquent taxes and certainly it was the duty of the authorities to include those in its suit but that obligation would be no more binding than it would be to sue for all instead of a part of the delinquent taxes due.

We think, therefore, that a suit and a judgment rendered for less than the amount actually due and owing would not render the judgment null and void or subject to collateral attack, nor serve to put the petitioners, who subsequently bought from Stovall and Appling, the purchasers at the tax sale, and who paid an adequate consideration, on notice of any such irregularities or defects that would defeat their title. The tax judgment was not rendered in disregard of express prohibitions or statutory limitations on power to award the relief granted in this case. If it was within the power of the court to award the penalties and interest its failure to do so cannot be said to make its judgment other than erroneous. Suppose that the court arbitrarily and notwithstanding all of the evidence to the contrary, entered judgment for the defendants denying recovery of all taxes, penalties and interest. That judgment would be erroneous and subject to reversal but it could not be reasonably said that the judgment was void or that without an appeal it would not be res judicata of the issues involved.

In *Clayton* v. *Hurt*, 88 Tex. 595, 32 S.W. 876, it is held that:

"Where a court of general jurisdiction, in the exercise of its ordinary judicial functions, renders a judgment in a cause in which it has jurisdiction over the person of the defendant and the subject matter of the controversy, such judgment is never void, no matter how erroneous it may appear, from the face of the record or otherwise, to be. * * *."

This Court has also said:

"* * * The jurisdiction of a court must be determined, not upon the court's action in deciding the questions presented in a case, but upon the character of the case itself. Jurisdiction is the power to decide, and not merely the power to decide correctly. * * *" Martin v. Sheppard, 145 Tex. 639, 201 S.W. 2d 810. See also Security Trust Co. v. Lipscomb, 142 Tex. 572, 180 S.W. 2d 151.

While the tax suit petition alleged that no penalties or interest were due it did conclude by praying for judgment "for the total amount of said taxes, together with all penalties, interest and court costs." It was within the power of the court to have rendered judgment for whatever penalties and interest that may have been due and owing.

Of course judgments are void when they run counter to statutory or constitutional restrictions. For instance, the administration by the probate court on the estate of a living person is void, a divorce decree issued by a county court is likewise invalid and other examples could be given.

In *Grant, et al* v. *Ellis*, 50 S.W. 2d 1093 (Com. App.), judgments assessing costs, including attorney's fees, against the county in the dsmissal of certain tax suits were held void because of the statutory provision that in no case should the state or county be liable for costs, including attorney's fees. Also in the following cases judgments were held to be

void where rendered contrary to constitutional or statutory provisions. *State* v. *Moak*, 146 Tex. 322, 207 S.W. 2d 894; *Higgins* v. *Bordages*, 88 Tex. 458, 31 S.W. 2d 52; *Cline* v. *Niblo*, 117 Tex. 474, 8 S.W. 2d 633. In this tax case there is no statutory restriction or inhibition expressly providing that a tax judgment shall not be rendered unless all penalties and interests are included. We, therefore, hold that the tax judgment was not void on this account.

We do not agree that the failure of the trial court's decree to include a judgment for penalties and interest as a matter of law would place the petitioner on notice, either constructive or actual, of any irregularities or fraud.

The omission of the interest and penalties was not an inadvertence. The matter was discussed between the County Attorney and the Tax Collector. Inasmuch as the taxes had not theretofore been assessed it was thought by them that in fairness to the taxpayers the same ought not to be charged. If this omission then seemed to be reasonable, fair, just and legal to these two county officials charged with the filing of suits and the collection of taxes and who acted entirely in good faith and without the suggestion of any fraud, we think it ought not be said as a matter of law to cause a layman to think otherwise.

The Court of Civil Appeals, while not deciding the point, expressed some doubt as to the lack of jurisdiction of the trial court over the person of the defendant, Mineral Holding Trust. This decision turns on the question of whether or not the affidavit of the County Attorney sufficiently complied with the provisions of Rule 117a, Texas Rules of Civil Procedure, as a predicate for service of process by publication. The rule provides in part that where the attorney makes affidavit that the residence of the owner is unknown and cannot be ascertained after diligent inquiry, the party

may be cited by publication. The affidavit executed by the County Attorney in this case reads as follows:

> "The residence of each of the defendants alleged in Plaintiff's Original Petition on file in the above entitled and numbered cause alleged as being 'Unknown' is in fact unknown and the parties described in said petition as the 'Unknown owner or owners' of the land described therein are also unknown, and that after due diligence and inquiry by the Tax Collector of Jackson County, Texas, and by me, as attorney for plaintiff, were not and cannot be determined and ascertained."

While the affidavit is not as specific as might be desired from a grammatical standpoint, we think it cannot be said that it is insufficient. The affidavit, though long, is one sentence. It says, stripped of non-essentials, that the residence of each of the defendants alleged to be unknown is unknown and the unknown owners are unknown and after due diligence and inquiry cannot be ascertained. The verbal phrase "cannot be determined and ascertained" may have two subjects as well as one and a reading of the affidavit would indicate that the affiant meant to say that the residence of the defendants and the identity of the unknown owners could not be determined and ascertained after due diligence and inquiry. We, therefore, are of the opinion that the affidavit sufficiently complies with the rule.

In this connection the point is made that Rule 117a[1] in effect at the time of the filing of this suit provided further that "where the rendition or assessment lists in the assessor's office shows the address of any record owner, the citation of such record owner may not be had by publication or posting, unless the party applying therefor shall first make affidavit that he has caused citation to issue for personal service on such defendant at the address shown on

[1] Vernon's Texas Rules Civil Procedure, 1948 Supp.

such rendition or assessment list and has attempted to procure service therefor, but has been unable to do so." But as pointed out by the Court of Civil Appeals the facts disclosing non-compliance with this provision are wholly outside of the record in the tax suit and the question must be determined within the wording of the affidavit itself.

While a search of the records of the Tax Assessor-Collector for a period of ten years back would have shown the St. Paul street address and delivery of personal notice there would probably have been forwarded to one of the trustees, in truth and in fact at the time of the tax suit it could hardly be said that this was the address of the Mineral Holding Trust. Mr. Cocklin had been dead nearly ten years. The tax attorney had made an unsuccessful effort by correspondence to locate the address of Mineral Holding Trust or the names and addresses of the trustees for the purpose of personal service. The Trust had no address in the St. Paul telephone or city directories and the record does not show that the names of any living trustees or their addresses were known to even Stovall much less to anyone else in Texas.

But if it should be held that the failure of the County Attorney to search the records and discover this address and then to proceed as the rule directs rendered the citation by publication null and of no effect, then at best, so far as respondents are concerned, the situation would only be comparable to that in *Harrison* v. *Sharpe*, 210 S.W. 731, wr. ref., and *Rowland* v. *Klepper*, 227 S.W. 1096 (Sup. Ct.) and to *Ditmore Land & Cattle Co.* v. *Hunt*, ... Tex. ....., 290 S.W. 2d 499, where the citation by publication was not effective by reason of the insufficiency of the attorney's affidavit.

In the *Harrison* case the property owner was not served with process, and, while the court held that the suit brought to set aside the tax judgment and sale was to be taken as a direct attack, the court granted the relief prayed for and

set aside the sheriff's deed to the original purchaser because the property owner had no notice of the suit or of the sale, coupled with the further essential fact that the property was sold for a grossly inadequate consideration, to-wit, $110.00 for a residence valued at $3,000.00 or more. If the sale had been upheld the owner would have entirely lost her property.

Conceding that respondents would have been entitled to recover title from Stovall and Appling, that cause of action has now been rendered moot by a settlement with those parties.

Presumably by this settlement respondents have acquired an interest in the title and in the royalty retained by Stovall and Appling and have surrendered any right to full redress from them.

All that is now being sought by respondents is the cancellation of the lease executed by Stovall and Appling to petitioners who paid therefor an adequate price and whose efforts in exploration for oil have made the property valuable. Petitioners are guilty of no fraud; they had no part in bringing the tax foreclosure proceedings; they expended considerable sums in exploration and development. It is difficult to see how there has been any injury to Mineral Holding Trust. It has little, if anything, to gain from setting aside the petitioners' lease. As a matter of fact that lease is more favorable to the Mineral Holding Trust than the one it gave to its co-respondents, Wherry and Green. The former reserves a 1/6th royalty, the latter only a 1/8th. We agree with the trial court in its finding that the petitioners are "innocent purchasers as to all parties, and certainly * * * to have equities exceeding those of Wherry and Green."

In restatement of the Law of Judgments, Sec. 115, p. 560, the law is said to be that:

"* * * Where there has been a judgment which had the effect of transferring a property interest, and which, although subject to equitable relief, is valid, a person who purchases the property from the successful party is protected to the same extent as one who purchases property from another who had procured the title from the former owner by fraud. The transferee is protected if he has paid value and if at the time he acquired the title he had no notice of the grounds for equitable relief. Likewise, where a valid judgment has been obtained under circumstances such that equitable relief would be granted against it, and thereafter property is sold by means of an execution sale, one who buys the property at the sale is protected if he had no notice of the grounds for equitable relief."

Under all of the circumstances we hold that the trial court in rendering the tax judgment had jurisdiction of the parties and of the subject matter and that the judgment rendered was not void. We further say that the fact of the judgment failing to include, along with the taxes, the corresponding penalties and interest, did not as a matter of law serve to put the petitioners upon inquiry of any errors or defects. If other facts asserted by respondents may be said to raise a fact issue as to the bona fides of petitioners that matter is set at rest by the findings of the trial court.

The judgment of the Court of Civil Appeals is reversed and that of the trial court is affirmed.

.....

FRANK P. CULVER, JR.
Associate Justice

Associate Justices Brewster, Griffin and Smith dissenting.

Opinion delivered
December 5, 1956

IN THE
SUPREME COURT OF TEXAS

No. A-5854

ALUMINUM COMPANY OF AMERICA AND CROWN PETROLEUM CORPORATION, *Petitioners*, v. MINERAL HOLDING TRUST, C. A. GREEN, R. B. WHERRY, GUY F. STOVALL AND F. E. APPLING, *Respondents*.	From Jackson County First District

DISSENTING OPINION

I cannot agree to the disposition of this cause made by majority. In my opinion, the suit brought by respondents, Mineral Holding Trust, C. A. Green, R. B. Wherry and Guy F. Stovall is a direct attack on the tax sale. *Harriman* v. *Sharpe*, 210 S.W. 731, wr. ref.; *Rowland* v. *Klepper*, Tex. Civ. App., 189 S.W. 1033, 377 S.W. 1096; *Shaffer, et al* v. *Schaleben*, Tex. Civ. App., 236 S.W. 2d 234, wr. ref.

The uncontradicted facts in this case show that the property sold under the tax judgment and order of sale had not appeared on the tax rolls for the years on which suit was brought for delinquent taxes. The record further shows that this property did not appear on a supplemental tax roll or a delinquent tax roll nor was it assessed for taxes prior to the filing of the suit, the judgment and sale. I do not believe the provisions of Article 7320, et seq., Vernon's Annotated Civil Statutes of Texas, are complied with so as to give jurisdiction to the District Court to entertain tax suit; therefore, the court had no jurisdiction of the subject matter.

I further do not believe that jurisdiction was obtained over the person of Mineral Holding Trust, in this tax suit because of the failure to comply with the plain provisions

of Rule 117a, Vernon's Rules of Civil Procedure, as it was in force at the time of the tax suit. That rule, in part, provides that "* * * record owners of such property or any apparent interest therein, including, without limitation, record lien holders, shall not be included in the description of 'unknown owners'; * * * and provided further that where the rendition or assessment list in the assessor's office shows the address of any record owner, citation of such record owner may not be had by publication or posting, unless the party applying therefor shall first make affidavit that he has caused citation to issue for personal service on such defendant at the address shown on said rendition or assessment list and has attempted to secure service thereof, but has been unable to do so."

The record shows without controversy that Mineral Holding Trust had been assessed and paid taxes for the years 1936, 1937, 1938, 1939 and 1940 and that the address was on the tax roll at the time suit was filed. It is shown by the uncontroverted evidence that the deed of Mineral Holding Trust to its property was of record in the office of the County Clerk of Jackson County, Texas, for many years prior to the filing of this tax suit, the judgment therein, and the sale thereunder. Further, it is shown by the undisputed evidence that this deed showed the address of Mineral Holding Trust as St. Paul, Minnesota. Therefore, Mineral Holding Trust could not be an "unknown owner" by virtue of the specific terms of the rule, and could not be cited by publication. No citation for personal service on Mineral Holding Trust was ever issued nor was any citation ever sent to St. Paul, Minnesota. The affidavit made by the County Attorney does not comply with the requirements of the rules; therefore, no jurisdiction was acquired over the person.

.....

MEADE F. GRIFFIN
Associate Justice

MFG:HS

Associate Justices Brewster and Smith join in this dissent.

5. *Orders of the Supreme Court:*

IN THE
SUPREME COURT OF TEXAS

No. A-5854 December 5, 1956.

ALUMINUM COMPANY OF AMERICA ET AL. vs. MINERAL HOLDING TRUST ET AL. } From Jackson County, First District.

This cause came on to be heard on writ of error to the Court of Civil Appeals for the First Supreme Judicial District, and the original transcript and the transcript showing the proceedings in the Court of Civil Appeals having been duly considered, because it is the opinion of the Court that there was error in the judgment of the Court of Civil Appeals, but no error in that of the District Court, it is therefore *adjudged, ordered* and *decreed* that the judgment of the Court of Civil Appeals be, and hereby is, reversed, and that the judgment of the District Court be, and hereby is, in all things affirmed; that respondents, Mineral Holding Trust, by Claude R. Beddall, Adda M. Cocklin, Thomas H. Richardson and Max G. Boercher, Trustees, C. A. Green and R. B. Wherry, and their surety, The Fidelity and Casualty Company of New York, pay all costs in this behalf incurred and expended in this Court and the Court of Civil Appeals, and that this decision be certified to the District Court of Jackson County, Texas, for observance.

(Opinion of the Court by Associate Justice Culver. Dissenting opinion by Associate Justice Griffin in which Associate Justices Brewster and Smith join).

"No. A-5854 March 27, 1957

ALUMINUM COMPANY OF AMERICA ET AL vs. MINERAL HOLDING TRUST ET AL. } Jackson County, 1st District From

This day came on to be heard respondents' motion for rehearing in the above numbered and styled cause, and after due consideration, it is ordered that said motion be, and is hereby, overruled."

APPENDIX C

Presentation of the Issues

Implicit in all allegations of fact and argument, the Constitutional point was thus explicitly stated:

1. In "Additional Statement of Position on Behalf of Appellees" in the Court of Civil Appeals:

> "From our standpoint, our property has been taken without any tax lien being imposed, and without tax notices or even the citation we were entitled to receive being given, all by fraudulent imposition, upon the Court's jurisdiction and our rights. If such proceeding stands, there is no substance to the guarantee in each Constitution that our property shall not be taken from us except by due process of law."
> (This followed by argument of particulars)

2. The sixteenth among the counterpoints in Petitioners' Reply to Petition for Writ of Error to the Supreme Court of Texas, all of which are here reproduced, raises the issue explicitly:

"We will endeavor to focus attention on the real issues by counter propositions addressed to petitioners' points as numbered with the Roman numerals:

"Counterpoints

"1. The tax foreclosure judgment was the exercise of witheld and prohibited power (I).

"2. The tax foreclosure judgment contained on its face evidence of its nullity (II).

"3. Our attack is direct (III).

"4. The publication procedure was void (IV).

"5. No presumption could support the citation procedures' obvious disregard of the rules and the law (V.)

"6. The Court's effort at charity towards the County Attorney and his intent, justified or not, does not affect the result of his overt failures to follow the law in the publication procedure (VI).

"7. The defective affidavit showed no jurisdiction and put petitioners to inquiry which would have disclosed the facts (VII).

"8. No taxes were due or lien created; and petitioners were charged with knowledge (VIII).

"9. The Court had no jurisdiction to assess taxes or foreclose a lien for taxes never lawfully assessed or levied by anyone with authority (IX).

"10. There was no tax liability or lien for taxes, none such having been lawfully determined and fixed (X).

"11. Petitioners are not innocent purchasers (XI, XII, XIII, XIV, XXIII).

"12. Respondents, Mineral Holding Trust, R. B. Wherry and C. A. Green, together own the land, are satisfied with their relationships between themselves, and are entitled to recover their land as though Mineral Holding Trust had not parted with any of its title (XVI, XVII, XIX, XX, XXI, XXII).

"13. Said respondents' relationships between themselves are matters of mutual satisfaction and complete virtue, but wholly irrelevant to any issue in this case affecting the equities between petitioners and them (XVI, XVII, XIX, XX, XXI, XXII).

"14. Petitioners have no equities (XVI, XVII, XIX, XX, XXI, XXII).

"15. If petitioners have equities, such would at most entitle them to be placed in status quo, but not to keep our land (XVI, XVII, XIX, XX, XXI, XXII).

"16. Upholding the validity of the tax foreclosure would deny due process guaranteed by the Federal Constitution's Fourteenth Amendment, and by the Constitution of the State of Texas (All points)."

3. From "Brief of Respondents in reply to Petitioners Application for Writ of Error", a brief filed on behalf of all of petitioners in the Supreme Court, the 8th Counterpoint (we omit other counterpoints and argument) reading:

"VIII.

"By the illegal tax suit proceedings and sales and transfers made thereunder respondents have been deprived of their property in violation of Section 19 of Article I, and Section 1 of Article 8 of the *Constitution of the State of Texas*, and in violation of Section 1 of Amendment 14 of the *Constitution of the United States* guaranteeing to respondents due process of law."

4. From separate brief of C. A. Green and R. B. Wherry filed in the Supreme Court of Texas, the 8th Point of Argument (we omit copying here the other points and supporting argument):

"8. The tax foreclosure sale must be declared void because it and the judgment upon which it depends did not accord the due process of law required both by our Texas Constitution and by the Fourteenth Amendment to the Constitution of the United States."

5. From the Petitioners Motion for Rehearing in the Supreme Court (calling particular attention to

Grounds 1 to 12 inclusive, the remainder being pertinent):

Mineral Holding Trust, C. A. Green and R. B. Wherry join in this motion, respectfully requesting the Court to grant rehearing in the cause, set aside the opinion of the majority dated December 5, 1956, and on reconsideration affirm the result reached by the Court of Civil Appeals. For grounds said movants respectfully represent:

1. The majority opinion takes our property without due process of law in a manner forbidden alike by the Texas Constitution and by the Fourteenth Amendment to the Constitution of the United States, in that none of the procedures and actions necessary to fix tax liability and lien and to give jurisdiction to a court to foreclose a tax lien were followed; that is, the due course of law without which our property right can not constitutionally be destroyed by the fixation and foreclosure of a tax lien has not been followed and accorded us.

2. The majority opinion takes our property without due process of law in a manner forbidden alike by the Texas Constitution and by the Fourteenth Amendment of the Constitution of the United States, in that it decrees Mineral Holding Trust lost its title by proceedings in which in fact it was without notice and without opportunity to be heard as required by our Constitutions, respectively.

3. The Court's judgment upholds as legal the prostitution of the processes of the District Court by the grossest character of fraud, conclusively apparent on the record and conclusively determined by the Court below to be factually such as to shock the conscience of the Court, and denies the

statutory and common law and constitutional right to set aside a judgment so obtained by direct attack as against all who hold under it; and this effect of this Court's judgment denies to us the due process of law guaranteed by the Constitution of Texas and the Fourteenth Amendment to the Constitution of the United States.

4. The majority opinion takes our property without due process of law in a manner forbidden alike by the Texas Constitution and the Fourteenth Amendment to the Constitution of the United States, in that this Court's very opinion takes our property without decision of the basic issue of jurisdiction in the tax foreclosure proceedings arising under the statutory and sole grant of judicial power to the Court found in Article 7320, Revised Civil Statute.

5. No severed non-producing mineral interests (holdings of speculative value only) were taxed in Jackson County prior to 1936; from 1936 to the present more such interests were not taxed than were taxed; our interest alone of all such interests in Jackson County was selected for retroactive "taxation" for the years 1922-1935; our interest alone was selected for retroactive "taxation" from the majority of such interests not taxed for the years 1941-1948; our interest alone from all the interests of such character untaxed for the years in question was selected for "judicial sale"; and law which would permit this discrimination against anyone, particularly a non-resident, and particularly in a proceeding where such non-resident has no notice or hearing and permit the consequent destruction of such owner's property, denies due process of law guaranteed by our Texas Constitution and the Fourteenth Amendment to the Constitution of the United States.

6. The majority opinion takes our property without due process of law in a manner forbidden alike by the Texas Constitution and by the Fourteenth Amendment to the Constitution of the United States, in that the Court assumes terms of our settlement with Stovall and Appling, uses its assumption to destroy our property, and at the same time destroys our rights under our contract and against petitioners themselves who are parties to that contract, which, if the Court will abandon assumption and but read its duplicate on file among the papers, provides over the signature of Petitioners' Attorneys:

> "1. It is agreed between all parties to said litigation acting herein through their attorneys that this settlement and compromise will not constitute any admission by the appellants in said Court of Civil Appeals proceeding or subsequent related proceedings of the validity of the leases now held by Aluminum Company of America and Crown Central Petroleum Corporation, or the validity of the title upon which said leases are based, and that this settlement and agreement is made without prejudice to the rights on appeal of either appellants or the corporate appellees. This agreement is executed by said appellants upon faith of agreement by said corporate appellees that, as between said corporate appellees and appellants, this cause may go to conclusion the same as though this agreement had not been made, and without prejudice to any party to said appeal other than the individual appellees foreclosed hereby."

7. The majority opinion takes our property without due process of law in a manner forbidden alike by the Texas Constitution and by the Fourteenth Amendment to the Constitution of the United States, in that the Court disposes of this case by adoption of many of petitioners' misrepresentations of the record and the issues, and without

apparent awareness of our contentions, the true issues, and the record facts, we being constitutionally entitled to a decision on the actual facts of the record and on the controlling issues; for instances:

(1) The majority assumes there were some kind of proceedings to levy taxes, and by calling such "proceedings", which are non-existent, merely irregular, and by assuming that taxes were assessed where there were none in fact assesed, disregards the plain evidence that there were no tax assessments and no delinquencies whatsoever.

(2) The majority ascribes to us the contention that the judgment was void for mere irregularity in the proceedings, and by tour-de-force converting the true issue to the one so created, decides upon that false issue.

(3) The majority converts the Court of Civil Appeals' true holding to a holding that the judgment was void for failing to recover all tax liability; whereas the Court of Civil Appeals judgment was that there was no tax liability and no foreclosure power, and that the impossibility of delinquent tax liability and foreclosure power existing without penalty and interest liability also existing, as adjudicated in the attacked judgment was evidence of the judgment's fatal infirmity appearing on its face, as it plainly is.

(4) The majority sets up a false issue, namely, whether failure to include penalty and interest renders a tax foreclosure judgment void, and decides upon that false issue.

(5) The Court makes the following erroneous statements:

"The omission of the interest and penalties was not inadvertence. The matter was discussed between the County Attorney and the Tax Collector. Inasmuch as the taxes had not theretofore been assessed it was thought by them that in fairness to the taxpayers the same ought not to be charged. If this omission then seemed to be reasonable, fair, just and legal to these two county officials charged with the filing of suits and the collection of taxes and who acted entirely in good faith and without the suggestion of any fraud, we think it ought not be said as a matter of law to cause a layman to think otherwise."

In this are the following vices:

(a) It is a holding, so far as the alleged conversation is concerned, not supported but contradicted by the record (as pointed out by Wherry and Green in the brief and apparently unnoticed by the majority opinion) and based wholly on a thoroughly challenged and completely discredited claim to this effect by petitioners advanced in their brief without support in the record.

(b) It is a holding contrary to the undisputed fact that the assessor made up a false and fraudulent statement about the records and what they showed, and the necessary corollary that he actively and fraudulently thus participated in the attempted theft of our land.

(c) It is a holding contrary to the County Attorney's testimony and his admission that he knew of no possibility of delinquent tax liability without penalty and cost at the time he instituted the proceedings, which of itself convicts him of filing a pleading in which he alleged both that delinquent tax liability existed and that conditions existed which made the existence of such liability an impossibility.

(d) It is a holding as respects the County Attorney's integrity in the matter, based on presumption and against the facts that, if he made the correct affidavit

as the Court holds he did, he perjured himself, since the Court of Civil Appeals has factually conclusively determined, and it is otherwise apparent on the record, that the slightest diligence would have led to the location and address of Mineral Holding Trust; also if he avoided "criminal responsibility" by not making the required simple affidavit, he could have done so only by intent, and did so by a most clumsy subterfuge to simulate compliance with this Court's command in Rule 117-A.

(e) The majority's holding disregards the plain truth that penalties and interest were not omitted by the decision of these two "charitable men" to disobey the law, but because neither taxes, nor penalties, nor interest were due at all.

(f) Finally it is a holding that the law did not bind these two, but they were free to disregard and change it, and did so to the destruction of our property rights and contrary to every statute on the books and all the decisions that have ever construed them.

8. The majority opinion takes our property without due process of law in a manner forbidden alike by the Texas Constitution and by the Fourteenth Amendment to the Constitution of United States in that our property has been taken as for taxes due, and as by foreclosure sale, in the total absence of tax assessment, total absence of lien fixation, total absence of such facts as are made the basis of Article 7320's grant of jurisdiction to the Court, total absence of notice and hearing as required by law, and by a procedure undebatably a gross fraud upon us and the Court; and the Court denies us all remedy and the remedy heretofore established by our law; whereas for these and each of these wrongs the Fourteenth Amendment to the Constitution of the United States and the Constitution of Texas command that remedy be given, as the meaning of both such

constitutions is phrased in Article 1, Sec. 13, Texas Constitution, that "every person for an injury done him, in his land — shall have remedy by due course of law."

9. The majority opinion takes our property without due process of law in a manner forbidden alike by the Texas Constitution and by the Fourteenth Amendment to the Constitution of the United States in that the majority disregard and destroy the Rule of law prescribed by the Legislature for assessment of taxes, fixation of tax liens, and foreclosure of tax liens, and substitute therefor the unauthorized and private operation by public officials by proceduce not authorized, which substitution if made the governing rule of action will wholly supplant government by law, establish in its stead anarchy, and invite destruction of property by fraud the while destroying the remedy for wrong.

10. The majority erred in refusing to sustain Wherry and Green's eighth point of argument reading:

> "8. The tax foreclosure sale must be declared void because it and the judgment upon which it depends did not accord the due process of law required both by our Texas Constitution and by the Fourteenth Amendment to the Constitution of the United States."

11. The majority erred in not sustaining all Respondents' eighth point of argument reading:

> "By the illegal tax suit proceedings and sales and transfers made thereunder respondents have been deprived of their property in violation of Section 19 of Article I, and Section 1 of Article 8 of the Constitution of the State of Texas, and in violation of Section 1 of Amendment 14 of the Constitution of the United States guaranteeing to respondents due process of law."

12. The majority erred in not sustaining Wherry and Green's first point of argument reading:

"1. Respondents' attack upon the foreclosure sale is direct; and the uncontradicted evidence showing the judgment and foreclosure sale to be void must be given effect."

13. The majority erred in not sustaining Wherry and Green's second point of argument reading:

"2. The judgment and sale dependent thereon are void on any attack, not for irregularity or set in partial excess of power, but for the total lack of power caused by the total lack of return of any of the lands as delinquent (that is the total absence of levy and assessment of taxes and fixation of lien evidenced on delinquent rolls), only lands so returned delinquent being entrusted to the tax lien foreclosure jurisdiction of the Courts by Article 7320 of the Revised Civil Statutes."

14. The majority erred in not sustaining all these respondents' fifth point of argument reading:

"The present suit is a direct attack on the tax suit proceeding."

15. The majority erred in not sustaining all these respondents' sixth point of argument reading:

"The trial court in the tax suit case acquired no jurisdiction of either the person of Mineral Holding Trust or the subject matter of the suit, and therefore, the judgment entered therein is absolutely void."

16. The majority erred in not sustaining all these respondents' seventh point of argument reading:

"The trial court was without jurisdiction to render judgment for taxes and foreclosure of the tax lien on land that had been duly assessed and taxes paid on one assessment."

17. The majority erred in not sustaining Green and Wherry's third point of argument reading:

> "3. The judgment is void on any attack because it exhibits inconsistency and evidence of fatal infirmity on its own face, in that it adjudicates legal impossibility, namely, both that taxes are delinquent and that no interest, penalties or costs are due, which adjudication is tantamount to decision that taxes are both due and not due and lien both existent and non-existent; and this feature invites and requires inquiry into a situation in which any inquiry reveals that no tax was ever levied or lien fixed, that the Court had no jurisdiction, and that the whole procedure was a fraud upon the owner and the Court."

18. The majority erred in not sustaining Green and Wherry's fourth point of argument reading:

> "The tax foreclosure judgment is void, on collateral or direct attack, because, upon the face of the Deed Records, Mineral Holding Trust was an owner of known address or residence, to-wit: St. Paul, Minnesota, and not susceptible of service by publication as an owner of unknown residence or address."

19. The majority erred in not sustaining Green and Wherry's fifth point of argument reading:

> "5. The tax foreclosure judgment is void on any character of attack, *a fortiori* void on our direct attack; because: (1) There is no, or no clear, affidavit, such as is, *estrictissimi juris*, required to authorize publication service, to the effect that Mineral Holding Trust's residence is unknown and cannot be ascertained after diligent inquiry; and (2) The judgment permits and requires resort to the record to ascertain both the identity of the defendants and who were served and how."

20. The majority erred in not sustaining Green and Wherry's sixth point of argument reading:

> "6. The tax foreclosure judgment is void on any character of attack, and a fortiori void on direct attack; because: (1) Mineral Holding Trust's address appearing on rendition or assessment lists in the Assessor's office, publication citation, was not permitted in the absence of attempt at personal service and failure, proved by affidavit filed in the papers; and (2) the ambiguities in the judgment and record and the information on the deed records equally chargeable to petitioners, together or singly invited and required the inquiry which would easily have revealed the proceedings' fatal lack."

21. The majority erred in not sustaining Green and Wherry's seventh point of argument reading:

> "7. Because the purported tax foreclosure sale was void for the lack of jurisdiction in the Court to enter judgment and order the sale, Petitioners do not have available the defense of bona fide purchase; and they also are not bona fide purchasers for value because under the law they are in the position of purchasers of a chance of title whether the attack be collateral or direct, as against the total invalidity of the judgment and sale and as against the fraud upon the land-owners and Court which entirely produced them."

22. The majority erred in not sustaining Green and Wherry's ninth point of argument reading:

> "9. These respondents are not debarred from recovery by any equitable considerations."

23. The majority erred in not sustaining Green and Wherry's tenth point of argument reading:

"10. Petitioners are not shielded or given our property by any equitable doctrine."

24. The majority err in the application of Article 7345(b); R.C.S. to our detriment in these particulars:

(1) They refer to and apply procedural portions of the article repealed and supplanted by Rule 117a.

(2) The statute does not have any effect upon any issue of this case, except by Sec. 13, which is not referred to but dishonored in the application of the Statute by the Court. This section expressly preserves the jurisdictional provisions of Chapter 10 including Art. 7320; and this section and Article 7320 are disregarded and overridden by the majority herein.

(3) As interpreted the Article, which merely regulated parties and proceedings, is made to repeal all laws regulating assessments, fixation of lien and jurisdiction.

(4) The application of this article is applied to an issue not present but manufactured and destroyed viz: whether a foreclosure is void because of foreclosure for less than the taxes due and secured by lien.

25. The majority err in assuming taxes were assessed or due, saying . . . "the tax assessor figured up the amount of taxes due"; whereas no assessment was made, no taxes were due, and the request and the action were for and resulted merely in a false and fraudulent certificate that the public records, the sole source of tax liability and lien, reflected tax liability and lien and a delinquent return of our land.

26. The majority err in stating the issue and our position as being that "irregularities" are the basis of our attack and "that before suit can be maintained for taxes it must

appear that the taxes have been regularly assessed by the proper authorities and have become delinquent", the contention and issue being:

(1) That for tax liability and lien to exist at all there must be substantial compliance with the statutory requirements.

(2) That for the District Court's tax foreclosure jurisdiction to exist over lands, they must be on delinquent roll or rolls under provisions of Article 7320, the Court's charter of power.

(3) Only when it has jurisdiction under Art. 7320 does a court have jurisdiction to pass upon issues of irregularity or any other issue in a tax case.

27. The majority err in stating our contentions and the issues, stating we "assert many irregularities in the tax suit proceedings of such a nature, they say, as to render the judgment void —" in that the opinion omits at this point and all other places statement and decision of our true basic contentions, namely that the foreclosure judgment is completely void for the lack of jurisdiction over the subject matter, lack of power to enter the decree, and absence of jurisdiction over the person of the defendants, and also must be set aside because induced by and itself essentially fraud for which Art. 7336 makes the title of any purchaser and consequently the title of any person holding under any purchaser subject to being set aside. As against such contentions, we have demonstrated that there can be no issue of innocent purchaser raised.

28. The majority err in holding that the trial court "did have jurisdiction of the subject matter, the judgment was not void on that ground, and the Court of Civil Appeals correctly so held."

29. The majority err in stating:

> "The Court of Civil Appeals held in effect that, as penalties and interest accrue automatically and are necessarily as much a part of the amount owed to the taxing authorities as the taxes themselves, the trial court was not empowered to render judgment omitting these charges that are and must become due when the taxes became delinquent. The Court had decided that this rendered the judgment void and if not void it was such an irregularity on the face of the judgment as to put the petitioners on notice and prevent them from occupying the position of innocent purchasers.";

Whereas such are not the holdings of the Court of Civil Appeals as any reading of the opinion plainly shows. The Court of Civil Appeals held that the District Court did not have power to enter the judgment it entered because there was no returning of the lands delinquent and no liability for taxes established, as required, by rolls. It held that taxes were due and delinquent, and that no penalty and interest and costs were due, were complete inconsistencies in the adjudication that taxes were due and delinquent, and that no penalty and interest and cost were due, were complete inconsistencies in adjudication, as in plain law and fact they are, tantamount to adjudication that delinquent taxes are due and lien exists, and that no delinquent taxes are due and no lien exists, and that this inconsistent adjudication put any person on inquiry. By misstating the holding of the Court of Civil Appeals, the majority pose a false issue, ascribe to the Court of Civil Appeals' holding and to the issues of this case a ridiculous content, and of course easily destroys such false issues.

30. The majority err in holding that the holding of the Court of Civil Appeals "is premised upon the theory that a suit for delinquent taxes and for foreclosure of the tax lien is wholly statutory and unless the statutory authority

is strictly followed the Court is without jurisdiction"; whereas the holding of the court below and the issue in this case is premised upon the propositon that every court of general jurisdiction is limited by the grant of power to it and that any court of general jurisdiction which has not been granted power may not exercise it and that the exercise of withheld power by a court of general jurisdiction is a void act.

31. The posing by the majority of the issue of whether tax foreclosure proceedings are proceedings in exercise of a special jurisdiction, and the court's related handling of the authorities, are in error in that the issue is not whether the tax foreclosure proceeding was a proceeding in the exercise of special jurisdiction. The question is whether a court of general jurisdiction in the exercise of a withheld and prohibited power can effectually adjudicate. The authorities cited by the Court as well as the authorities cited by us and ignored by the Court conclusively establish that a court of general jurisdiction in exercising withheld and ungranted power performs an act of no consequence whatsoever, and that such result is constitutionally necessary.

32. The majority err in holding that there is a distinction between attempted administration on the estate of a living person, attempted decree of divorce by a County Court, and attempted tax foreclosure when the lands in question have not been returned delinquent within the meaning of the Court's charter of power, Article 7320 R.C.S.; for in each instance there is a simple attempted exercise of a power not granted to a court of general jurisdiction.

33. The majority err in the application of *Grant* v. *Ellis*; *State* v. *Mosk*; and other authorities cited in that these and each of them and all authorities cited by us require that the

foreclosure decree herein attacked be stricken as an attempted exercise of jurisdiction over lands not returned delinquent, which class of lands is not placed within the tax foreclosure power of the District Court.

34. The majority err in saying: "We do not agree that the failure of the trial courts decree to include a judgment for penalties and interest as a matter of law would place the petitioner on notice, either constructive or actual, of any irregularities or fraud."; because,

(1) This statement is a complete misstatement of issue and contention, borrowed from petitioners' perversion of our contention and the holding of the Court below.

(2) What was held to put the purchaser on notice was an adjudication of legal impossibility, namely that taxliability and lien and absence of liability for penalty, interest and cost, as adjudicated, can not coexist.

(3) The notice imported by this, by the Court of Civil Appeals' holding and our contention and the plain fact is that no taxes exist, not that any irregularity exists. Of course a corollary, if no taxes exist, some kind of fraud is present.

35. The majority err in holding "in this tax case there is no statutory restriction or inhibition expressly providing that a tax judgment shall not be rendered unless all penalties and interest are included. We, therefore, hold that the tax judgment was not void on this account."; because:

(1) This constitutes a demolition of an issue created by the Court in adopting the perversion of the issue by petitioners.

(2) Deciding the case on this issue, the actual issue which is present is avoided and we are denied the right to a decision of our case on the issues actually present and on the facts as they exist.

36. The majority err in making the following holdings:

"The omission of the interest and penalties was not an inadvertence. The matter was discussed between the County Attorney and the Tax Collector. Inasmuch as the taxes had not theretofore been assessed it was thought by them that in fairness to the taxpayers the same ought not to be charged. If this omission then seemed to be reasonable, fair, just and legal to these two county officials charged with the filing of suits and the collection of taxes and who acted entirely in good faith and without the suggestion of any fraud, we think it ought not be said as a matter of law to cause a layman to think otherwise."; because:

(1) There is no support in the record for this entire paragraph of the Court's opinion.

(2) The conversation referred to is entirely irrelevant to any issue of the case, and its assumed content is not proved of record.

(3) What is assumed to have seemed reasonable and fair can have no possible relevance here, as the "seeming" is to people who participated in the grossest character of fraud against us, which has shocked the conscience of the court below and has been determined as a matter of fact, a determination now conclusive, to be shocking and gross; and there is no room for any presumption of any fairness and justice in the whole revolting transaction.

(4) Whatever these people may have thought does not change their duty, the fraudulent nature of their acts, and the law which they completely violated.

(5) This whole consideration is again based on a false issue, the true issue being whether our land can be taken when no taxes are due and none were ever assessed, and when our lands were never returned delinquent, the Court never had jurisdiction, and the complete procedure was a gross fraud on our rights and the dignity and integrity of the Court.

37. The majority err in construing the affidavit as possibly having the meaning that the residence of Mineral Holding Trust is unknown and can not after diligent inquiry be ascertained. To give the affidavit the meaning given by the Court the petition must be construed with it; and on such construction, no such meaning appears. As construed by the Court the affidavit was false under the undisputed facts and findings of the Court of Civil Appeals, and the County Attorney should answer to his "criminal responsibility" and the tax sale should be set aside.

38. The majority err in holding the affidavit sufficient to authorize citation of Mineral Holding Trust by publication, and completely ignored the prohibition against citation by publication contained in Rule 117a promulgated and adopted by this Court.

39. In treating the issues relating to the efficacy of the publication notice, the majority err in not following the established law that, in the employment of this "miserable substitute", prerequisite facts must exist in fact and all prerequisite actions must be taken and evidenced, all *strictissimi juris*, the majority instead reversing the law and supplying the facts by presumption and speculation and against the actual facts, and supplying the action and the evidencing thereof by presumptions, laborious interpretation, and ascription of ungrammatical meanings to the affidavit and to the petition.

40. The majority err in holding that non-compliance with this Court's rule 117a must be ascertained from the affidavit itself and can not be shown by evidence denors the record because:

(1) This is a direct attack and the invalidity of a judgment because of lack of jurisdiction over the person can be shown by evidence dehors the record as

against the whole world, including alleged innocent purchasers for value; and

(2) The complete disrespect and disregard for this Court's rule and the absence of the prerequisites prescribed by it to jurisdiction over the person of Mineral Holding Trust, wholly deprive the Court in the tax foreclosure proceeding of a jurisdiction of the person of Mineral Holding Trust, render the judgment void, susceptible of being shown void on direct attack even under the holdings of all the Texas Courts, and necessarily require that its voidness be given effect if the constitutional guarantees of our Constitution and the Fourteenth Amendment to the Constitution of the United States are to be observed.

(3) The majority err in disregarding the plain fact, undisputed on the record, and established as a matter of fact conclusively by the Court of Civil Appeals, that Mineral Holding Trust's Trustees and owners were easily discoverable by anyone who made any reasonable inquiry, and were so discovered by all who made reasonable inquiry, and that the tax records themselves and the deed records gave the key to such discovery, and that the required diligence was not exercised by the County Attorney, and err in considering factors that might lead to a contrary conclusion and in apparently giving some effect to such consideration.

41. The majority err in not giving effect to *Harrison* v. *Sharpe*, *Rowland* v. *Klepper*, and *Ditmore Land & Cattle Company* v. *Hicks*, as required by the law of those cases and the facts of this, and instead holding that because Stovall and Appling have yielded practically, to us all in their power to yield, that that circumstance prevents our recovery from Alcoa and Crown the remander of our property unlawfully attempted to be taken from us in the tax foreclosure proceeding.

42. The majority err in refusing the apply the law of *Harrison* v. *Sharpe* because in the Court's own statement of that law the case has perfect application to our facts; there was no jurisdiction of the person in fact in our case; the price paid at the foreclosure sale was in fact inadequate and as grossly inadequate as in the *Sharpe* case; unless we are awarded our land as against Alcoa and Crown, we have been deprived of it without due process of law.

43. The majority err in attempting to give Alcoa and Crown the right to prevail as innocent purchasers and in disregarding the established law that this is not a proceeding in which we are attempting to assert equity, but to defend our legal title and to set aside a void judgment which did not pass our title.

44. The majority err in applying to our case the innocent purchaser doctrine which, apart from the here inapplicable recording acts, is restricted to the protection of those who have actually acquired legal title as against a secret and undisclosed equity.

45. The majority err in not even considering and deciding the law which we have advanced showing that the doctrine of innocent purchaser for value has no place in this case.

46. The majority err in quoting as applicable restatement of the law of Judgment, Sec. 115, p. 160 in two particulars, namely:

> (1) In failing to quote the heading which shows the application of this text, namely: "i. *Bona fide purchasers — judgment and sale valid*", our case being one in which the judgment and sale are void.

(2) In not quoting and applying the succeeding paragraph (page 561) which is applicable to the case of a void judgment such as we deal with here:

"j. *Bona fide purchasers — Void judgment or sale.* Where there has been a void judgment which purported to transfer a property interest, a person who purchases the property is not protected and the person against whom the judgment was rendered is entitled to equitable relief against him. This is true even though the subject matter of the action was a negotiable instrument. Likewise, where although the judgment was valid, an execution sale based upon the judgment is void, a purchaser at the sale is not protected. On the other hand, if in either case the proceedings leading to the judgment or sale were fair on the face, the officer who served process or participated in the sale is not subject to liability (see Restatement of Restitution, §73)."

47. The majority err, having based its entire opinion predominantly on false issues and omitted considerations of the true ones, in summarizing by saying:

"Under all the circumstances we hold that the trial court in rendering the tax judgment had jurisdiction of the parties and of the subject matter and that the judgment rendered was not void."

48. The majority err in further summarizing on a false issue and holding thereon thus:

"We further say that the fact of the judgment failing to include along with the taxes the corresponding penalties and interest did not as a matter of law serve to put the petitioners upon inquiry of any errors or defects."

49. The majority err in further summarizing:

"If other facts asserted by respondents may be said to raise a fact issue as to the bona fide of petitioners

that matter is set at rest by the findings of the trial court."

in that by the established law the bona fides of the petitioners is a complete irrelevance.

50. The majority err in saying:

"All that is now being sought by respondents is the cancellation of the lease executed by Stovall and Appling to petitioners who paid therefor an adequate price and whose efforts in exploration for oil have made the property valuable. Petitioners are guilty of no fraud; they had no part in bringing the tax foreclosure proceedings; they expended considerable sums in exploration and development. It is difficult to see how there has been any injury to Mineral Holding Trust. It has little, if anything, to gain from setting aside the petitioners' lease. As a matter of fact that lease is more favorable to the Mineral Holding Trust than the one it gave to its correspondents, Wherry and Green. The former reserves a 1/6th royalty, the latter only a 1/8th. We agree with the trial court in its findings that the petitioners are 'innocent purchasers as to all parties,' and certainly * * * to have equities exceeding those of Wherry and Green.'"

because

(1) the ultimate relief we seek is not as stated, but to recover our minerals from petitioners, who claim them.

(2) The price paid for their lease by Alcoa and Crown is an irrelevancy.

(3) That Alcoa and Crown brought in a gas well on other property and developed other lands is an irrelevancy, the minerals on our land, and not Alcoa and Crown, give our land value; Alcoa's and Crown's good fortune does not extend to the destruction of our property rights.

(4) Petitioners' freedom from the "guilt" of fraud, if existent, is an irrelevancy; but their effort to take and hold our lands under the facts of this case is in itself fraud.

(5) Injury to Mineral Holding Trust exists by this Court's upholding unlawful destruction of its title; Wherry and Green have lawfully succeeded to part of its title; this Court has no right to destroy Mineral Holding Trust's deed and lease; the majority errs in not deciding just as though Mineral Holding Trust had never executed its deed and lease to Wherry and Green.

(6) The majority err in assuming the guardianship power to decide what arrangements would be most beneficial to Mineral Holding Trust, to nullify its lawful lease and deed, to destroy Wherry's and Green's rights, and force upon Mineral Holding Trust a lease it did not make and does not desire.

(7) "Equities" have no place in the case.

(8) There are no "equities" in petitioners as equities are known to the law.

(9) Wherry's and Green's rights are those of holders of legal title, against which no "equities" can prevail.

(10) Wherry's and Green's conduct has simply been that heretofore permitted by law but now erroneously not allowed by this Court to be effective, namely, to acquire, with their own money, from Mineral Holding Trust, an interest it was willing to sell, and an interest just as valid in their ownership as it was in the ownership of Mineral Holding Trust.

WHEREFORE, these Respondents pray that the Court grant rehearing and upon reconsideration affirm the result reached by the Court of Civil Appeals. We are preparing and will tender for filing, as soon as we can complete it, a written argument in support of this motion.

SUPREME COURT, U.S.

JUL 22 1957

JOHN T. FEY, Clerk

No. 138

In The

Supreme Court of the United States

October Term, 1956

Mineral Holding Trust of St. Paul, Minnesota, R. B. Wherry and C. A. Green,

Petitioners,

v.

Aluminum Company of America, Crown Central Petroleum Corporation, et al.

Respondents.

PETITIONERS' RESPONSE TO RESPONDENTS' REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

John E. Daubney
Pioneer Bldg.
St. Paul, Minnesota

W. J. Barnes
415 Texas National Bank Bldg.
Houston 2, Texas

Knox W. Gilmore
415 Texas National Bank Bldg.
Houston 2, Texas

John W. Stayton
Capitol National Bank Bldg.
Austin, Texas

Joyce Cox
2828 Gulf Bldg.
Houston 2, Texas

Attorneys for Petitioners,
Mineral Holding Trust,
R. B. Wherry and
C. A. Green

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No. 1029

In The

Supreme Court of the United States

October Term, 1956

Mineral Holding Trust of St. Paul, Minnesota, R. B. Wherry and C. A. Green,

Petitioners,

v.

Aluminum Company of America, Crown Central Petroleum Corporation, et al,

Respondents.

PETITIONERS' RESPONSE TO RESPONDENTS' REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

To The Honorable The Supreme Court of The United States:

Petitioners' case is one of a public official, or public officials, being persuaded, in the course of a private fraudulent effort to destroy petitioners' property, to take simulated official action to make it falsely appear that taxes and lien existed, and to foreclose non-existent liens, the entire procedure being conducted by not giving the required or any fair notice to petitioners. The due process issue de-

pends on the totality of the facts, which this Court's former opinions, we believe, commit it to review. Should the matter be otherwise, then the disregard of the law's rule, which we hear of in Duval County and now see apparently emerging in Jackson, may spread. The interest of all levels of society, individual and official, in the rule of law, as evidenced by the Fourteenth Amendment, and obedience to it, can only be secured in the decision of individual cases, including, we submit, the instant one.

We respond briefly under the three headings of our attack, relating them to respondents' reply, and comment on the matters of avoidance raised, principally the subject of innocent purchaser.

I. ASSESSMENT

(Respondents' Point III, pp. 11-14)

That the assessor had power and duty to assess, in the sense of commencing the assessment process and following it through in the manner required by law in conjunction with the Board of Equalization, does not, as respondents urge, avoid these facts:

(1) The assessor never followed the course of the assessment law, insofar as he was given responsibility and authority in connection therewith, in any particular.

(2) The property was never placed on any tax roll for the years in question, except for the year 1940, taxes for which year were paid.

(3) The substitute for the observance of due course of law was solely and only an informal and false statement, misleadingly placed on an official form (the form provided for notice to delinquent taxpayers) that the property was on the delinquent rolls for the years

in question. This very statement has been lost. Only a permanently filed and permanently preserved official tax roll resulting from official action by the Board of Equalization, can impose tax and fix lien.

If such radical departure from the law's mandatory course can substitute for compliance, the rule of law guaranteed by the Constitution's Fourteen Amendment and heretofore enforced by this Court is, to our view, at an end. Respondents' cases sustain no such unconstitutional procedure.

II. JURISDICTION OF THE LAND

(Respondents' Argument I, page 8)

Article 7320 was the foreclosing court's charter of power. True, the court is a court of general jurisdiction; but a court of general jurisdiction may not exercise withheld power. The statute plainly confers jurisdiction only as to lands returned delinquent on delinquent rolls. The cases cited by respondents (Note 5, page 8 of response) do not establish otherwise. Their relevance we are unable to determine, but point out in this connection that ours is a direct attack which, under the law, may be brought at any time within four years to set aside the most fair seeming judgment providing all interested in the relief sought are brought before the Court.

III. NOTICE

(Responsive to Respondents' Argument IV, pp. 14 to 20)

In this connection we call to the Court's attention a useful summary of the law announced by this Court in this connection, a case note, "Requirements of Notice in In Rem Proceedings", *Harvard Law Review*, Vol. 70, No. 7, page 1257.

The issue is, not whether the Supreme Court of Texas has final power to interpret its rules, but, whether it can permit property to be destroyed by procedures which, clearly, were not those prescribed.

Mineral Holding Trust's deed record address was known. Its address was on the tax records. The law in effect required attempt and failure at personal service before publication notice was authorized. It also required affidavit that the address could not be found after diligent inquiry. There was complete disregard of the law's command and no reasonable notice in fact.

We do not have the issue of whether publication notice would have sufficed if the circumstances had been such as authorized it under the rules. If the circumstances had authorized such publication service under the rules, there would still be a most serious question of its validity at the present time. Means of communication and travel now available make Minneapolis as accessible now to Houston as two parts of the same city were to each other a hundred years ago. After such changes, what is reasonably to be required to give fair notice may be radically different now from what would have been required when personal notice across long distance was impracticable, if not impossible. We believe we detect recognition of this latter thought in the later opinions of this Court. Certainly it is recognized in the changes in our Texas rules which were so flagrantly disobeyed in this cause. Publication was always a misgrable substitute for personal service.

In this connection and others, respondents argue "Practicalities". The law was simple; its command clear. Did "practicalities" authorize the County Attorney to disobey the law because in his private opinion, as he expressed it, he concluded that attempt at personal service, required by law, would not have been effectual? Respondents seem to

argue that a public official is entitled to judge for himself whether he will obey the law. Such "practicalities" are not, we submit, a part of the American system. Once Legislation exists, only the Legislature or authorities acting pursuant to its direction, can abrogate or suspend its provisions.

Respondents' argument that Rule 117a was amended, effective subsequent to the filing of this suit, has no bearing, we submit. In this connection other "practicalities" are advanced. If they were relevant, we would point out that the very statement handed the tax assessor showed the years for which taxes were paid. A simple look at the records for those years would have shown Mineral Holding Trust's St. Paul address, and pointed to the receipt which paid 1940 taxes as well.

IV. INNOCENT PURCHASER DOCTRINE

(Respondents' Argument II, pages 8-11)

As we read the Constitution, its protection is not "except when the rights of third parties have intervened". As we read the Fourteenth Amendment, it is a prohibition against the taking of anyone's property without due process; and if property is not taken by lawful means, it is difficult to see that any third parties' rights can intervene and become superior.

A void judgment by definition cannot destroy property rights. Texas Courts have required that in some cases void judgments must be directly attacked, that is when the judgments are fair seeming and regular upon their face. If a void judgment is not subject to some kind of attack, property would be subject to being taken without due process. Ours is a direct attack and the "innocent purchaser's" "equity" is merely to be made whole to the extent he or it has benefitted the owner. *Harrison* v. *Sharpe*, 210 S.W. 721, *G.H.&S.A.* v. *Blakeney*, 73 Tex. 180.

We appealed to a court of equity and offered to do equity. We also appealed to a Court of law and pleaded for our legal right. Ours is a blended system. We plead the facts and are entitled to the relief the law allows.[1] The point is further emphasized in Rule 51, and in many decisions announced before and after the Rules of Civil Procedure were adopted. In the interest of time we do not quote Rule 51 or refer to any of the other authorities for a point so elemental and generally known. We are entitled to our rights at law; and we have here stripped our case to the stark essentials which we believe constitutionally require under the Constitution itself, regardless of law or equity, the return of our property at the hands of this Court.

For the Court's benefit, if contrary to our view such matters are considered relevant, we will catalog some of the matters which respondents, Alcoa and Crown, were, we submit, charged with knowing when they purchased:

(1) That the Constitution and Statutes (quoted by respondents) under which they purchased, made their title vulnerable for fraud if in fact (as it did) fraud created their title.

(2) That the laws of Texas permit even a perfect appearing judgment, void in fact, to be set aside by direct attack instituted in four years.

(3) That the foreclosure judgment (Tr. 55) did not name in its body any defendant.

(4) That the foreclosure judgment adjudicated a legal impossibility, namely, that taxes were delinquent,

[1] Rule 48, *Texas Rules of Civil Procedure*, reads:

"A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based upon legal or equitable grounds or both."

and that no liability for penalty, interest or costs existed (see opinion of Court of Civil Appeals on this).

(5) That Mineral Holding Trust was, as its name indicated, a trust, and that its deed record address was St. Paul, Minnesota.

(6) That the judgment on its face showed that taxes for some years had been paid and that accordingly some address for Mineral Holding Trust must appear on the tax records.

(7) That notwithstanding that when any address appeared on the tax records under the governing law, attempt at personal service, failure at such attempt, and affidavit proof of such attempt and failure, must appear as a prerequisite to notice being given by publication.

(8) That in fact no attempt at personal service had been made and no affidavit of attempt and failure was in the record.

(9) That the record showed a clumsily defective affidavit for publication. (See Court of Civil Appeals comment on this.)

(10) That the foreclosure was as for taxes on the delinquent rolls and that if there were any such a look at the public records would disclose their existence or non-existence.

(11) That Stovall and Appling had bought valuable lands for a pittance and that to attempt to purchase and hold a title so purchased would itself be fraud on the part of Alcoa and Crown under Texas authority (Reply, page 9).

In the face of these considerations, if relevant, we would have to weigh the agreement between respondents that the property would not be developed within the redemption period (to do nothing to call the matter to Mineral Holding

Trust's attention). Also respondents "cured" their other tax titles in their blocks but never sought to make contact with Mineral Holding Trust. This agreement and this conduct would have to be weighed on the background of the fact that Appling was agent for Aluminum Company of America in assembling the block, was himself a large landowner in the block, and shared in the ownership of oil rights procured by lease under his agreement with Aluminum Company of America.

V. RESPONDENTS' ARGUMENT THAT WHERRY AND GREEN ARE NOT ENTITLED TO ASSERT THEIR RIGHTS AS ASSIGNEES

(Respondents' Argument V, pp. 20-23)

An assignee or vendee stands in the shoes of his assignor or vendor. The power to pass one's entire right is an important aspect of "property". To argue that Mineral Holding Trust could not be deprived of its property, but could not pass unimpaired an interest in it, is to say that that the void judgment destroyed Mineral Holding Trust's *jus disponnendi*. Petitioners together assert the entire right which Mineral Holding Trust could have asserted had it never sold part of its right to Wherry and Green.

Also Mineral Holding Trust has never sold its minerals to Respondents. Is not the right not to sell, equally with the right to sell or even to give, a right of property? No Court has the right to make conveyances for Mineral Holding Trust, or to question its valid conveyances. It is itself satisfied with its transaction with Wherry and Green, and says that without their assistance no part of this property would have been recovered.

Respondents' criticism of the dealings between Petitioners is, we submit, irrelevant. Those dealings are of concern only to Mineral Holding Trust and Wherry and Green. They have not affected respondents. If the matter

is considered otherwise, Mineral Holding Trust, here repeats for itself that, in all particulars, there was on the part of Wherry and Green fair dealing and full disclosure of all material facts, and that it is satisfied with its bargain and desires its conveyances to be respected, and its right to choose its lessee and operator. If relevant, it can and will justify the choice on economic and other grounds. Petitioners suggest that nothing in the record actually appearing is contrary to these statements, despite the uncharitable speculative conclusions with which respondents are free.

Respondents contend that we affirm the tax judgment in our pleading. Alternative pleading is permitted under our rules, even inconsistent pleading; and we are puzzled to know how it can be said that in a pleading which forcefully asserted that taxes were non-existent and the foreclosure judgment was void there can be found an affirmance of the tax judgment. No Court below so regarded the matter.

Neither *Brown* v. *Bonougli*, nor any consideration of efficiency, should turn officials and courts loose to impose taxes and affix liens except by course of prescribed law and upon notices which are required and which are fair. The statutes we have quoted are the controlling statutes. The suit was necessarily controlled by them. The Act of 1937 (Respondents' Appendix, p. 37) was merely regulation of proceedings under, and was not repeal, of Article 7320 or other articles we advert to in our petition. Its provisions do not alter the necessary result in this cause.

CONCLUSION

Our case presents a fraudulent simulation of tax liability, tax lien, foreclosure jurisdiction and foreclosure sale, all under the facts without the due process of the law as Constitutionally and Statutorily prescribed. The dissenting minority of three in the Supreme Court summarized our case so much better than we have been able to do that we respectfully request the Court to read that summary ap-

pearing on pages 110 and 111 of our petition's Appendix.

We respectfully repeat our prayer that we be allowed to present to this Court the full record and fully to brief the facts and the issues.

JOHN E. DAUBNEY
Pioneer Bldg.
St. Paul, Minnesota

W. J. BARNES
415 Texas National Bank Bldg.
Houston 2, Texas

KNOX W. GILMORE
415 Texas National Bank Bldg.
Houston 2, Texas

JOHN W. STAYTON
Capitol National Bank Bldg.
Austin, Texas

JOYCE COX
2828 Gulf Bldg.
Houston 2, Texas

Attorneys for Petitioners,
Mineral Holding Trust,
R. B. Wherry and
C. A. Green

PROOF OF SERVICE

I, Joyce Cox, one of the attorneys for Petitioners herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 12th day of July, 1957, I served copies of the foregoing Petitioners' Response to Respondents' Reply to Petition for Writ of Certiorari to the Supreme Court of Texas on respondents as follows:

Upon Aluminum Company of America and Crown Central Petroleum Company by delivering copies to Hon. Tarlton Morrow of the firm of Vinson, Elkins, Weems & Searls at his office in the Esperson Building, Houston, Texas.

By mailing copies to the Hon. Frank Guittard, Guittard & Henderson, P. O. Box 586, Victoria, Texas, they being attorneys of record for Guy F. Stovall and F. E. Appling.

Joyce Cox

JOYCE COX.

No. 1029

In The

Supreme Court of the United States

October Term, 1956

Mineral Holding Trust of St. Paul, Minnesota, R. B. Wherry and C. A. Green,

Petitioners,

v.

Aluminum Company of America, Crown Central Petroleum Corporation, et al.,

Respondents.

WAIVER BY STOVALL AND APPLING OF RIGHT TO FILE BRIEF

C. C. Carsner
Victoria, Texas
Attorney for Stovall & Appling, Respondents

Of Counsel:

S. G. Sample
Edna, Texas

Guittard & Henderson
Victoria, Texas

No. 1029

In The

Supreme Court of the United States

October Term, 1956

Mineral Holding Trust of St. Paul, Minnesota, R. B. Wherry and C. A. Green,

Petitioners,

v.

Aluminum Company of America, Crown Central Petroleum Corporation, et al.,

Respondents.

WAIVER BY STOVALL AND APPLING OF RIGHT TO FILE BRIEF

To The Honorable Supreme Court of the United States:

Come now Guy F. Stovall and F. E. Appling, two of the respondents, and waive their right to file a response to the Petition for Writ of Certiorari in the above entitled case, and say:

As shown in the judgment of the Court of Civil Appeals (Petition for Writ, pages 94-95), and in the opinion of the Texas Supreme Court (Petition, page 108), settlement was made between these respondents, Stovall and Appling, on

the one hand, and all of the petitioners on the other hand. In light of such settlement, Stovall and Appling are not further affected by the litigation and hence waive any right to file either a reply or a brief in response to the Petition for Writ of Certiorari.

Respectfully submitted,

GUY F. STOVALL
F. E. APPLING

Respondents

By C. C. CARSNER,
Victoria, Texas

Attorney for Respondents

Of Counsel:

S. G. SAMPLE
Edna, Texas

GUITTARD & HENDERSON
Victoria, Texas

Proof of Service

I, C. C. Carsner, one of the attorneys for respondents, Stovall and Appling, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the .... day of July, 1957, I served copies of the foregoing Waiver on Petitioners, Wherry and Green, by mailing copies to Knox W. Gilmore and W. J. Barnes, at 415 Texas National Bank Building, Houston 2, Texas, and to Joyce Cox at 2828 Gulf Building, Houston 2, Texas, and to John E. Daubney, Pioneer Building, St. Paul, Minnesota, and John W. Stayton, Capitol National Bank Building, Austin, Texas; and that I served copies of the foregoing Waiver on the other Respondents, Aluminum Company of America and Crown Central Petroleum Corporation, by mailing copies to Gordon Stokes, Tarlton Morrow, C. E. Bryson and Vinson, Elkins, Weems & Searls, Esperson Building, Houston 2, Texas.

Charles C. Carsner

C. C. Carsner

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IN THE

Supreme Court of the United States

October Term, 1956

MINERAL HOLDING TRUST OF ST. PAUL, MINNESOTA, R. B. WHERRY AND C. A. GREEN, *Petitioners*,

v.

ALUMINUM COMPANY OF AMERICA, CROWN CENTRAL PETROLEUM CORPORATION, ET AL., *Respondents*

Reply to Petition for Writ of Certiorari to the Supreme Court of Texas

GORDON STOKES
TARLTON MORROW
VINSON, ELKINS, WEEMS & SEARLS
Esperson Building
Houston, Texas
Of Counsel

C. E. BRYSON
Attorney for the Respondents

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No. 1029

IN THE

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MINERAL HOLDING TRUST OF ST. PAUL, MINNESOTA, R. B. WHERRY AND C. A. GREEN, *Petitioners*,

v.

ALUMINUM COMPANY OF AMERICA, CROWN CENTRAL PETROLEUM CORPORATION, ET AL., *Respondents*

Reply to Petition for Writ of Certiorari to the Supreme Court of Texas

To the Honorable Supreme Court of the United States:

Now come the ALUMINUM COMPANY OF AMERICA and CROWN CENTRAL PETROLEUM CORPORATION and file this their Reply to the Petition for Writ of Certiorari on file. For the purpose of brevity, these Respondents will be known as Alcoa.

Questions Presented by the Reply:

(1) Whether the principles established by this Court in the case of *Miedreich v. Lauenstein*, 232 U.S. 236, are

not controlling in respect of the rights of Alcoa, who was not a party to the institution of tax judgment and sale but bought in reliance upon the integrity thereof.

(2) Whether the Statutes of Texas, adopted under the direction of the Constitution of Texas, vesting in the Assessor power to list and value real property when the owner fails to do so, render valid the valuation places thereon by the Assessor.

(3) Whether the rule announced in *Ballard v. Hunter*, 204 U.S. 241, does not settle the question of due notice in light of the holding of the Texas Supreme Court that citation by publication was sufficient under its rule and that Due Process does not necessarily require personal citation to the nonresidents.

(4) Whether, although personal service may be required normally, failure to effect such under the peculiar facts of this case was not a denial of Due Process.

(5) Whether the Petitioners Wherry and Green are in position to raise the constitutional questions posed. They were not parties to the tax suit; had no property taken; their recovery will not be helpful of the Trust, whose property allegedly was taken; in terms of substantial justice their claims against Alcoa were found wanting.

Statement

I.

In the Appendix to the Petition will be found extended Findings of Fact by the Trial Judge (pp. 61-80). We believe, however, that summaries of portions thereof will be advantageous, particularly in respect of any issue of

alleged want of Due Process, since such to some extent presents a practical problem in light of the peculiar facts of the case.

II.

From its very inception, this controversy from a practical standpoint has been a controversy between Wherry and Green on the one hand and Alcoa on the other. Rights of relief against Stovall and Appling were clear under the Trial Court's fact findings.

Alcoa acquired an oil, gas and mineral lease dated February 12, 1952, from Stovall and Appling, they alone being the Respondents who are charged with having been guilty of wrongdoing in connection with the institution of the tax suit. The lease provides for a 1/6 royalty, has a primary term of 6 years (within which production must be had or the lease will terminate), and provides for an annual delay rental of $2.50 per acre. On the other hand, the lease from Wherry and Green, taken from the Trust on September 29, 1953, provides for only a 1/8 royalty, contains no duty to pay delay rentals, and has a primary term of 10 years.

Wherry and Green paid $5,000, in the circumstances hereinafter mentioned, for this lease and for 1/2 of the 1/2 mineral interest claimed by the Trust and an equivalent interest in the royalties and rentals under any "valid" lease.[1]

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[1] In this respect they purposely put themselves in a position to claim the rentals and royalties under the Alcoa lease should it be sustained; i.e., to take advantage thereof if they could not defeat it.

It will thus be seen that the Trust will benefit rather than lose should the lease of Alcoa be established. This was known to Wherry and Green at the time of such acquisition, but was not known to the Trust, which did not know of the 1/6th royalty in Alcoa's lease. The difference between a royalty of 1/6 and a royalty of 1/8 is substantial in the event of production, to say nothing of other benefits even if production be not had. Wherry and Green, they admit, took a chance of title and have no claim back against the Trust (S.F. p. 389). All rights under the Alcoa lease, the rights of reverter and as well the right to 1/2 the bonus received from Alcoa and Crown, Stovall and Appling held as constructive trustees in light of their claimed wrongdoing; and this whether the judgment and sale be valid or void or whether the judgment be set aside or not.

III.

Admittedly, Stovall and Appling owned the surface and 1/2 the minerals. Their title to the remaining 1/2 rests upon a tax judgment from suit filed on October 5, 1950, with judgment entered January 17, 1951. Citation by publication was published in the County Seat newspaper of Jackson County, Texas, once a week for 4 weeks, the first publication being on October 12, 1950.[2]

It was addressed as follows:

[2] "TO: Mineral Holding Trust, a private corporation, the unknown owners, stockholders, assignees and legal representatives of Mineral Holding Trust, a private corporation, their unknown legal representatives, Mineral Holding Trust, a partnership and/or unincorporated concern, the unknown owners, partners, assignees and legal representatives of Mineral Holding Trust, a partnership and/or unincorporated concern, their unknown heirs and legal representatives, the unknown owner or owners of the hereinafter described real property, their unknown heirs and legal representatives, owning, having or claiming any interest or lien in the property hereinafter described * * *."

The judgment is in rem as against the property only. The order of sale was issued February 8, 1951, executed April 3, 1951, after a prior publication of the notice of sale in the same County Seat paper for a period of more than 20 days before the date of sale. Alcoa had nothing to do with the tax suit and knew nothing of the property or of Stovall and Appling at that time. The Trial Court found as a fact that Alcoa properly relied on the tax sale. Their initial interest in the property arose from the fact that through geophysical work in the late summer and early fall of 1951 they found evidence of a likely structure in the general area. They then set about to acquire a wildcat block of some 6,000 acres, the 640 acres here involved being along the south edge thereof.[3]

An initial well was drilled on the lease by Alcoa in the fall of 1953 and completed in October, 1953, at a depth of about 9,000 feet and at a cost of approximately $150,000. The well was located within 3/4 to 1 mile of the nearest point of the land in suit. There had been necessary delay incident to assembling so large a block.

Wherry and Green (not previously interested in the area) learned of a probable "show" in the well about September, 1953, and immediately sent representatives to Jackson County (among them a man who had spent some years in a Tax Collector's and Assessor's office) to search out the names of nonresidents in an effort to contact them. They there learned of the tax suit and of the Alcoa

[3] The bonus paid for this lease sheds no light on bonus values at the time of the institution of the tax suit or the tax sale. No lease or oil activity is shown to have occurred from 1922 up to the time of the geophysical work of Alcoa. The bonus value was created only when it was made known that Alcoa had done this geophysical work.

lease. One of their men (then in the Kansas City area seeking to contact non-resident owners) was sent to St. Paul. There in some fashion he got in touch with Mrs. Cocklin (she owned 600 of the 663 certificates of interest in the Trust), who referred him to Mr. Fred Dowd, an attorney. Dowd being absent from the city, the business of the agent was not disclosed. Later, when it was more certain that production had been encountered, Wherry, learning that Dowd could be contacted in New York, flew there; and, being by Dowd referred to Mr. Beddall, in turn flew to St. Paul, where he met Beddall, who was an attorney and spokesman for the Trust and was the attorney who prepared the original Trust Instrument. At that time Beddall thought only two of the original seven Trustees were living; namely, Beddall and Richardson. Somewhat later one other turned up in Florida, a Mr. Boecher.

The agreement to lease and sell were oral and not enforcible under the Statute of Frauds. The lease was attached to a 15-day sight draft drawn upon, and subsequently paid by, Wherry and Green. This 15-day interim gave them further time (whatever their motive was) within which to "play" the well. The well came in, and this lawsuit ensued.[4] (See *Findings*, particularly XXIX and XXXIII.)

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[4] In the transactions between Wherry and the Trust no mention was made of the Aluminum Company, according to the testimony of Mr. Beddall (S.F. 108); and, according to Mr. Wherry, he purposely did not mention it. Wherry also was of the following view as expressed by him: "I never saw a tax sale almost that could not be set aside. I would buy almost anything under one, with one." (S.F. 388) Wherry and Green immediately characterized the value of their $5,000 purchase as over $100,000. (See S.F. p. 388)

The fact of the making of a well, of which Wherry and Green

IV.

The suit was characterized as, "A Bill of Review To Set Aside the Order of Sale, Sale, and Tax Deed Based upon Tax Foreclosure." It contains multitudinous alleged reasons why the relief should be granted, including charges of fraud against Stovall and Appling and also the allegation that Alcoa took with knowledge. The prayer consists of various requests for declaration based upon which there should be a removal of cloud from title (Prayer, paragraph 10, Tr. p. 26).

While it attacks the sale and judgment, it does not make the State, plaintiff in the tax suit, a party to the suit based upon the allegation in paragraph XXXI, Tr. p. 22. These allegations are to the effect that, the taxing agencies (County and State) having received the money paid at the tax sale, such operated to have paid all the taxes due.

As to the method pursued in assessing taxes, see Finding XVIII, page 66, and Finding XXVIII, page 71. Summarized, the Tax Assessor, purporting to exercise the authority conferred by the Constitution and Statutes, back assessed the property, valuing it at $2 per acre. (See Exhibit 29, p. 141, S.F. Vol. 2.) This was the valuation for nonproducing minerals fixed by the Board of Equalization. It was less than the actual value of the mineral interest, according to Mr. Wherry, who valued it at $50.00 an acre. It is the same valuation placed thereon by Cocklin on the

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either had actual knowledge or what they regarded to be assurance when they paid the draft, made the royalty become worth approximately $200 an acre according to the testimony (S.F. 310)—$32,000 for the 160 acre royalty deed. This aside from the value attributed to the oil and gas lease, which is of greater value according to Wherry (S.F. 441).

last payment of taxes for the year 1940. No renditions or payments of taxes were made by the Trust after the 1940 payment, which was paid in 1941. Findings as to what was paid and by whom are set out in Finding XXV.

As to the facts dealing with the question of whether the Trust could have been located for personal service, same are complex and will be dealt with in the Argument on that subject.

Argument

I.

Inasmuch as the holdings of the Texas Supreme Court foreclose all issues within its final jurisdiction, such as the "returned delinquent" theory, including a construction of the Texas Statutes and ordinary factual situations, we do not undertake to reply to much that is contained in the Petition. Undoubtedly the District Court of Jackson County had jurisdiction both under the Constitution and Statutes.[5]

II.

That there is no want of Due Process in recognizing the title of Alcoa is established, we submit, in view of the holding of this Court, and the underlying philosophy thereof, in the case of *Miedreich v. Lauenstein*, 232 U.S. 236.

We amplify this to a certain extent in light of the rule prevailing in Texas and the historical background thereof.

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[5] **Brown v. Bonougli**, 111 Tex. 275; **State Mortgage Co. v. Ludwig**, 121 Tex. 268; **Mexia Independent School Dist. v. City of Mexia**, 134 Tex. 95.

The Texas view is akin to that which apparently prevailed in Indiana, and most of it was established by the early decisions of this Court. Included in these is the case of *Grignon's Lessees v. Astor*, 2 Howard 343, which has been relied upon in Texas a number of times.

Under this rule in Texas[6] a judgment which does not affirmatively bear evidence of no jurisdiction must be respected until set aside. Indeed, this appears to some extent to be fundamental in light of the dignity which must necessarily be attached to judgments of courts of general jurisdiction.

In *Miedreich v. Lauenstein*, under the law of Indiana a substitute remedy was given against the sheriff's bond and regarded as adequate. Generally speaking, all those who abuse the use of processes are held responsible to the injured defendant. Under the law of Texas a remedy is given even as against a purchaser for value when the circumstances direct it. A leading case on this subject is *Harrison v. Sharpe*, 210 S.W. 721. A purchaser for value and without notice may even still be deemed a constructive trustee by insisting on his purchase if the relative loss of the defendant is out of due proportion in relation to the loss of the purchaser, as held in that case.

Petitioners say that the judgment is void; but, if not void on its face, must not there be a judicial determination of such? And in such a judicial determination, if the asserted rights of one who relies upon the solemn adjudica-

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[6] See **Murchison v. White**, 54 Tex. 78; **Crawford v. McDonald**, 88 Tex. 626. These cases have been followed in a number of instances. Purchasers are protected. **Jones v. Sun Oil Co.**, 107 Tex. 353, and cases cited; **Snell v. Knowles**, 87 S.W. 2d 871 (Writ of Error Refused).

tion of a court of general jurisdiction are not respected, where exists the policy which respects judgment?[7]

Clearly, there must be some balancing here as between the respective rights of the parties, and how may they be better balanced than as determined in Texas in a proceeding in which the respective equities of the parties may be weighed? Petitioners recognized this in the filing of their Bill, through which they appealed to a court of equity and offered to do equity, but deny such in their Petition here presented.

It must not be forgotten that actually a purchaser rightly looks at the judgment collaterally; that is to say, not with the view of questioning its validity but in reliance upon its validity. Such being the situation, he should be so protected unless upon showing of equitable considerations the contrary appears.

Petitioners say all this is obviated by a matter of procedure, namely, by bringing a direct action instead of attacking collaterally. Certainly, matters of such substantial quality do not depend upon the mere matter of procedure. Their substance must be looked into in order that the Court have full power to adjust the equities of the parties litigant.

The sanctity of a citation-by-publication judgment in Texas is fortified by Rule 109 of the *Rules of Civil Procedure,* which requires that the trial judge inquire into the sufficiency of the diligence exercised. (Reply Appendix, p. 27.) The Court here, in appointing the attorney ad litem to represent the defendants, presumably looked into

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[7] See reference to "invincible presumption." **Crescent City Live Stock Co. v. Butcher's Union,** 120 U.S. 160.

such sufficiency. At any rate, a purchaser rightly must so assume. Article 3818 dealing with execution sales generally, *Constitution*, Article VIII, Sec. 13, and Article 7330, dealing with tax sales, and Article 3323 dealing with probate orders fully recognize the right of reliance. (Reply Appendix, p. 55.)

Apparently the *Restatement of Judgments* adopts the view of *Miedreich v. Lauenstein*. See Section 117, particularly Subdivision (c), pages 567-568, and reference back to page 73, Section 12.

III.

We deal next with the question of the validity of the assessment.

The Supreme Court of Texas held it irregular but valid. The views of that Court, familiar with its Constitution and Statutes, ought to carry some weight even though there may be a duty upon this Court to make an independent inquiry when Due Process is involved.

We here briefly state the constitutional and statutory provisions, which are quoted and referred to either in the Appendix to the Petition or in the Appendix to this Reply.

The constitutional provisions are under Article VIII of the existing *Constitution of Texas*, adopted in 1876.

Section 1 requires that all property shall be taxed. Section 15 fixes a lien on landed property in respect of each annual levy. Section 11 provides that property "shall be assessed in the County where situated, and:

"All lands and other property not rendered for taxa-

tion by the owner thereof shall be assessed at its fair value by the proper officer."

Section 14 creates the office of Assessor and Collector as a constitutional officer who shall perform such duties as may be prescribed by the Legislature. (Reply, App. p. 26.)

The Statutes expressly enjoin the duty on the part of the owner of real estate (which includes the severed mineral estates) to list or render his property. (See copy of Statutes, Reply, App. 30-31.) He is charged with this duty in respect of the obligation he owes to help support the government. The property shall be rendered by him or his agent. In rendering, he is authorized to fix the value, which may or may not be accepted either by the Assessor or the Board of Equalization. However, if he fixes the value he is in no position to complain of its adoption. The value fixed by his agent is equally binding upon him.

Of necessity there must be some law dealing with the failure of one to render his property.

Article 7172 provides that the lien shall not be affected by the failure to assess in any given year but that the Assessor, "* * * may, in listing property for taxes for any years thereafter, assess all back taxes due thereon according to the provisions of this statute." The Assessor has an express duty enjoined upon him in this respect as determined in Article 7193 and Article 7207 (the latter adopted in 1888) in dealing with taxes for prior years. (Reply Brief, Appendix, pp. 33; 34.)

The Trust was charged with notice of these Statutes, inclusive of the authority thus to be conferred upon the

Assessor.[8] The thing that was acquired was not the minerals themselves but those rights over the minerals which are respected by the State and are protected by the State. The duty to pay is a character of consideration for such rights—as to nonresidents, the only obligation is to pay taxes.

Thus, the Assessor here was authorized to back assess this property. He was statutory agent to do so. There is no contention that the valuation was excessive. There is no claim of excuse by inadvertence or want of knowledge since the Trust was informed that taxes were due. Both in respect of the properties in Texas and those owned elsewhere in the United States, the Trust simply failed to give them any attention either by rendering or by paying.

While the $2 valuation is nominal, it is the one set up by the Taxing Authorities for nonproducing minerals generally. It was the value placed on the property when it was rendered by the Trust. According to Mr. Wherry, the property had a value of $50 per acre. The real complaint is not in respect of the valuation or the duty to pay taxes, but in respect of the adequacy of notice of the suit.

Similar statutes to those in Texas have been adopted in numerous states. They are in keeping with the philosophy expressed by Justice Holmes in *Pullman Co. v. Knott*, 235 U.S. 23, wherein the Company, having failed to furnish information based upon which valuation could be fixed, was said to have permitted its right so to do to go by.

The provisions of the Statute dealing with defenses in tax suits, do not forbid proof of invalidity of the tax

[8] **North Laramie Land Co. v. Hoffman**, 268 U.S. 276.

assessment.[9] It has been held in Texas that the authority granted the Tax Assessor to render and value when the taxpayer fails or refuses to do so is proper.[10] Apparently this right of the Assessor to list and value is of ancient origin and has been recognized in several other states, inclusive of Florida[11], Louisiana[12], Maine[13], Massachusetts[14], and probably others.

We may say assuringly that a very large part of the real estate assessment in Texas are thus made by the assessor as unrendered.

IV.

We next deal with the sufficiency of notice of the suit.

A. As we read that opinion, this question is ruled by the opinion of this Court in *Ballard v. Hunter*, 204 U.S. 241, in two particulars.[15]

The Supreme Court of Texas is the final authority in respect of the interpretation and application of its Rules of Civil Procedure and of its Statutes.

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[9] **Town of Pleasanton v. Vance**, 277 S.W. 89; **Masterson v. Town of Hedley**, 265 S.W. 406.

[10] **Whelan v. State**, 282 S.W. 2d 378, 382, (Supreme Ct.).

[11] **Amos v. Jacksonville**, 81 So. 524.

[12] **Travelers Ins. Co. v. Board of Assessors**, 47 So. 489.

[13] **Powell v. City of Old Town**, 81 Atl. 1068.

[14] **Porter v. Norfolk Co.**, 5 Gray 365. See also cases cited, 84 C.J.S., p. 764, and **King v. Mullins**, 171 U.S. 404, dealing with laws of Kentucky.

[15] As stated at page 260: The assignment of error "Is based on the contention that the Supreme Court of the State erred in not deciding the plaintiffs in error were not given the notice required by the statutes of the State * * *. What the statutes required was for the Supreme Court to determine; whether, as determined, it constituted due process, is for us to decide." No attack is made on the constitutionality of the Rule in the case at bar.

As to the contention that a citation by personal service was in all events required, it will be noted that as to the nonresident defendants:

> "Not being defendants who were entitled to personal service, they cannot urge against the decree that they were not given personal service." (206 U.S. 265)

As stated by this Court in the case of *Leigh v. Green*, 193 U.S. 79, statutes providing for notice of tax suits must be read in light of the fact that the statutes are intended to reach those who are "so-minded" as to keep up with their taxes. See also *Longyear v. Toolan*, 209 U.S. 414, and *Huling v. Kaw RR Co.*, 130 U.S. 559, 564.

It is to be remembered also that, under the Constitution of Texas (Art. 8, Sec. 13) and Statute (Art. 7345b, Sec. 12) of Texas, there is a right of redemption for a period of two years after the recording of the deed in a tax sale. The recording of the deed gives a character of notice, at least under the philosophy of the law of Texas. The constitutional requirement of redemption was evidently adopted in view of the feeling that two years is a reasonable time within which one who presumably is keeping up with his property should become alerted to a tax judgment. In this case Petitioners had ten years prior to the tax sale and two years afterwards to give attention to their tax obligations of yearly rendition and payment.

B. If we be mistaken as to the sufficiency of our Reply in Paragraph A hereof, yet looking to the "practicalities and peculiarities of the case" as disclosed by the facts, there is, we submit, no want of Due Process on this question of notice.

The County Attorney did not have the same information as had Stovall with his information arising from the two letters which he wrote Dowd, attorney for Mrs. Cocklin, in 1949 and 1950. The County Attorney was imposed upon by not being furnished this information. It is suggested, however, that he was at fault in not learning the addresses of Van Sant (in two different States) and of Cocklin in St. Paul as disclosed by tax renditions 10 to 13 years old. This alleged fault is to be weighed in light of further facts. As this Court has pointed out, taxpayers who are neglectful of the duty to pay taxes ought not to rely upon their neglect as a basis for shifting an undue burden upon taxing authorities in seeking to locate them.

Summarized the facts are that the Trust had failed to record its instrument of creation in the records of Texas and had failed to record a conveyance from Van Sant to Cocklin made in 1941 wherein Cocklin became the owner of 600 of the 663 certificates of interest. Both Van Sant and Cocklin were dead, the latter having died in 1942. His widow still lived in St. Paul and was represented by Mr. Dowd as their attorney. In 1949 Dowd's attention was expressly called to the absence of recorded information with the request that this information be furnished. This letter also called attention to the probability of delinquent taxes. (See Appendix, p. 51, where this letter is quoted.) In 1949 the then spokesman for the Trust (in view of the death of four of the seven original Trustees and the unknown address of the fifth) was Beddall, who acted for the Trust in dealing with Wherry. His attention was directed to both the above facts. Nothing was done; not only so, but he testified, when asked whether the Trust

would have paid the taxes had he been notified of the suit:

> "I wouldn't say I would have paid them, and I wouldn't say I would not have paid them. * * * We were just waiting and holding for development." S.F. 122, line 22; S.F. 123, line 3.

The Trust, during Cocklin's and Van Sant's lifetime, knew of the existence of the duty to pay taxes. It developed on the trial that the tax receipts, the original of letters received, and copies of those sent by Cocklin were in his files. These showed that the Trust had reserved many thousands of acres of minerals (evidently based upon resale of lands after mortgage foreclosures through the companies owned by Van Sant) and that Cocklin held the view that the particular land would produce when properly tested.[16] Yet with this information no attempt after his death was made to render or pay taxes. Further, according to Beddall, the Trust had no telephone or other form of address at the time of the tax suit, maintained no office, had no money, and for years had conducted no business, had no meetings of its Trustees or Certificate Holders, had not rendered or paid taxes, either in Texas or elsewhere.

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[16] Petitioners produced from Cocklin's files (being also the Trust's files) tax receipts for 1936-40, and copies of letters to and from the Tax Collector re this Jackson County property written in 1936. Likewise, they offered the letters from Stovall to Dowd dated in 1949 and 1950 (1950 letter asking for a reply to the 1949 letter). They ought not to complain that they had no knowledge of the existence of the mineral interest, or of Cocklin's faith in its producing, or of the fact that taxes were to be rendered and paid. Note **Ontario Land Co. v. Yordy**, 212 U.S. 152, 159.

When the County Attorney was requested by the Assessor to institute the suit, he was informed by the data presented to him for suit that the Trust had no address. The County Attorney testified that he was desirous of locating the Trust. He says likewise he inquired of the Assessor (S.F. 465.) His first step was to write the Secretary of State of Minnesota, who advised that they knew nothing of the concern. He made inquiry in St. Paul of the Tax Collector but received no reply (S.F. 465.) The Trust Instrument was not only not recorded in Texas, but likewise was not recorded in Minnesota. If he had determined by looking at the tax records that a man named Cocklin was at one time connected with the matter and had caused the process to be sent to St. Paul with direction that Cocklin be contacted, no legal service could have been had upon his wife. Under the Declaration of Trust, the Trustees are given no express power to sue or be sued (Vol. 2, p. 117, Exh. 22 for Trust.) By indirection, however, it might have been learned through her that Beddall could be served. Whether tax officials, in light of inactivity and gross inattention of a taxpayer, as above detailed, should be required to take secondary steps looking toward service of process, may be doubted. Furthermore, it is highly speculative, as the Supreme Court of Texas pointed out, whether, had the notice been served, it would have yielded any payment to protect the property.

The inquiry arises whether there was a duty to look back 10 to 13 years, breach of which denies Due Process. This is to be weighed in light also of the fact that Rule 117 (a) (on the July previous to the filing of the suit in October) had been amended by the Supreme Court, upon the recommendation of a Committee of Members of the Bar of Texas appointed to that end by the

Court, limiting investigation back to 5 years, due to the undue burden placed on County Attorneys in looking back farther. (Reply, App. p. 51.) That Court presumably is familiar with the peculiar conditions prevailing in Texas. While this change in the Rules did not become effective until December 1, 1950, it was a fact before the County Attorney earlier as a member of the State Bar receiving the State Bar Journal in which the change had been published, to be weighed by him and now to be weighed by this Court in viewing this question of alleged vital breach affecting Due Process. The County Attorney cannot be charged with acting arbitrarily.

We respectfully submit that under the circumstances above detailed, it cannot be successfully asserted that the Supreme Court of Texas was in error in respecting the validity of the process here of that under the peculiar facts and the practical situation there was any want of Due Process.

In none of the more recent cases in this Court which are relied upon by Petitioners had the rights of third parties intervened.

In the *Covey* case, 351 U.S. 141, the only tax suit, the lady was served both by letter and by publication. This Court commented also on the fact that she was possessed of property, from which it would be inferred that she would normally have paid her taxes. This is to be contrasted with no such intent on the part of the Trust. Her mental condition was such that there was no notice in substance; and knowledge of this condition was such as to forbid the taxing authorities from relying upon notice. Attempt at redemption was immediate. That is the way we understand the facts.

In the case of *Walker v. City of Hutchinson*, 352 U.S. 112, Walker was in possession of the property, occupying it as his home, so we are informed.

As to the *Mullane* case, 339 U.S. 306, not only did the action in the tax suit here not seek to exempt plaintiff from an obligation, but it was docketed as one against the Mineral Holding Trust; and, in keeping with the want of any knowledge of the nature of the concern, it and the certificate holders were dealt with and cited in its various capacities as unknown shareholders or interest holders. (See f.n. 2.) While legal title may not be lost by abandonment in Texas, neglect to pay taxes over the period of time here should be held to constitute the character of abandonment mentioned in the authorities cited in the *Mullane* case.

Cases other than those involving taxes do not have the same historical background in respect of either what may be required by the State in its insistence upon payment of taxes due it or what may necessarily govern the nature of notice.

It is respectfully submitted that, however viewed, there is no want of Due Process in respect of the alleged inadequacy of notice. See Findings XXV, XXVI, XXVII, and XXVIII, Appendix to the Petition, pp. 67-72.

V.

On the assumption that Stovall and Appling were guilty of actionable fraud, it was unnecessary to set such a judgment aside in order that relief be had against them since they could be held constructively to hold title for the

Trust. But such would not afford relief against Alcoa, who was not shown to have knowledge of or to be chargeable with fraud. As to the leasehold estate claimed by Alcoa, the sole issue is between Wherry and Green on the one hand and Alcoa on the other. Thus, the sole issue in respect of Due Process now relied upon is one that must be set up by Wherry and Green. Hence the inquiry as to whether they may set it up.

We submit they are not in position to set up any right to relief based upon the doctrine of Due Process. Wherein was their property taken by the tax sale and wherein is it essential that they have relief to protect the Trust's right of relief?

Such rights of relief may be lost by waiver or by estoppel even by the party to the suit. And it appears to us it ought not to be permitted to be asserted when its assertion smacks of unfairness of the quality here; more particularly by third parties. To deny such relief to third parties in no wise interferes with the right of disposition of property, as Petitioners claim, for what is involved is a right of action. Courts are judges of the standing of litigants.[16a]

Wherry and Green used the judgment as a basis for bidding down the price paid for their lease and mineral interest. Why should they be granted a second use thereof?

They made only a partial disclosure to the Trust (having made any disclosure, a full disclosure was required), thereby purposely putting the Trust to a disadvantage and setting up an arrangement which, on its face, at least, it so appears,

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[16a] Wherry testified (S.F. 388) that he expressed no view to Beddall as to the validity of the judgment, simply stating: "I simply said I would take the property subject to the tax sale."

was intended to put Alcoa at a disadvantage. Wherry was emphatic in saying that he did not mention the Alcoa Company to the Trust. One apparent reason for this was that he did not want competition, and another reason, reasonably apparent, was that he did not want a disclosure to the Trust of the fact of the payment of a royalty in excess of a 1/8. Seeing also that Alcoa's lease terminated in 6 years absent drilling, he took a lease extending beyond this term to the end that he would be in position to "stand by" while the initial well be drilled on the tract in question by Alcoa to protect its lease. Standing by, he would have the benefit of paying for his part of the well if a producer and sharing no part of the loss if a non-producer.

The fact that he drove a hard bargain against the Trust without a full disclosure of the facts does not harm Alcoa, it is true. Yet such does not militate against the right of the Court to treat the conduct as of such quality as to forbid Wherry's right of action under the guise that property was taken without Due Process.[17] Wherry was an attorney of some years' standing. He expressed the view, while testifying, that the tax judgment was invalid or, at any rate, he would buy in opposition to any tax judgment as he had never seen one he could not set aside. He was engaged in speculating upon the outcome of his attack, and he occupies no position which, we submit, the Court should look upon with favor. In all events, this action having been filed in the nature of an equitable bill of review, the Courts were justified in

[17] The following cases support the view that a purchaser is not necessarily entitled to set up a want of Due Process in respect of a judgment against his grantor; **Estey & Camp v. Williams**, 133 S.W. 470 (Tex. CCA); **In re Hauer's Appeal**, 5 Watts S 475 (Pa.); **Bull v. Campbell**, 225 Fed. 923, 930 (CCA 8).

weighing the respective equities, and, so viewing, Wherry and Green were entitled to no relief. See the Trial Court's Supplemental Findings, Appendix to the Petition, p. XXXIII, p. 74 and XXXV, p. 75-6.

Another thing: In their Bill, while the Petitioners asserted for a multitude of reasons that there were no taxes due or, if due, there were penalties and interest due to which the Taxing Authorities were entitled, yet the State, as representative of the Taxing Agencies under the Statute, was not made a party to the Bill of Review. In Parapraph XXXI (p. 22 Tr.) of the Bill it is nevertheless alleged that the effect of the tax sale was to pay all taxes for years prior to 1950 and that a tender of the purchase money to Stovall and Appling alone was required. In Paragraph 12 of the Prayer (p. 27 Tr.) such relief is prayed for. One should not be permitted to affirm the tax judgment and sale in any particular and at the same time seek to repudiate it otherwise. See *Robb v. Voss*, 155 U.S. 13.

Conclusion

As pointed out by the Supreme Court in *Brown v. Bonougli*, 111 Tex. 275, 381, the Legislature of Texas has striven to give some degree of effectiveness to tax foreclosures. It was to this end that summary sales of realty were dispensed with and court foreclosures required. One of the most effective elements toward current tax payments is apprehension on the part of the taxpayer that payment will be forced by suit. To the extent that the judgment may not be relied upon by a purchaser, this threat is weakened. No reason thus exists why tax judgments should not have the same dignity as any other judgment of a court of general jurisdiction. Since 1897 (when Article 7320 was adopted as part of a general bill dealing

with the collection of delinquent taxes), numerous amendments have been made to the statutes but need not be traced here. These were matters traced in the Texas Courts. In 1937 another statute dealing with tax suit, comprehensive in quality, was adopted and afterwards amended in certain particulars in 1939, 1941, and 1947. This is the statute under which the suit here was instituted. Since the Petitioners did not list in their Appendix, we have done so that the Court may observe the existing law on the subject. (App. 35-51). (As pointed out, Subdivision 3(d), dealing with citation, has now been superseded by Rule 117(a)).

The only wrong charged against Alcoa, if there was a wrong, was in relying upon the validity of the judgment and the sale thereunder. They, upon inquiry, were informed that the concern was not to be found. (Finding XXXI).

Prayer

It is submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

C. E. BRYSON
Attorney for the Respondents

GORDON STOKES
TARLTON MORROW
VINSON, ELKINS, WEEMS & SEARLS
Esperson Building
Houston, Texas
Of Counsel

Proof of Service

I, C. E. BRYSON, one of the attorneys for Respondents herein and a Member of the Bar of the Supreme Court of the United States, hereby certify that on the 31st day of July, 1957, I served copies of the foregoing Reply To Petition for Writ of Certiorari to the Supreme Court of Texas and Appendix on Petitioners, Wherry and Green, by delivering copies to Knox W. Gilmore and W. J. Barnes at 415 Texas National Bank Building and to Joyce Cox at 2828 Gulf Building, Houston 2, Texas; and by mailing copies to John E. Daubney, Pioneer Building, St. Paul, Minnesota; and John W. Stayton, Capital National Bank Building, Austin, Texas; all being attorneys for Petitioners; and likewise by mailing to the attorneys for Stovall and Appling; Frank Guittard, P. O. Box 586, Victoria, Texas, and S. G. Sample, P. O. Box 1806, Edna, Texas.

C. E. Bryson

C. E. BRYSON

TURN TO NEXT CARD

APPENDIX

CONSTITUTION OF TEXAS

ARTICLE VIII.

§11. *Place of Assessment; Value of Property not Rendered by Owner.*

All property, whether owned by persons or corporations shall be assessed for taxation, and the taxes paid in the county where situated, but the Legislature may, by a two-thirds vote, authorize the payment of taxes of non-residents of counties to be made at the office of the Comptroller of Public Accounts. And all lands and other property not rendered for taxation by the owner thereof shall be assessed at its fair value by the proper officer.

§13. *Sales of Lands and Other Property for Taxes; Redemption.*

Provision shall be made by the first Legislature for the speedy sale, without the necessity of a suit in Court, of a sufficient portion of all lands and other property for the taxes due thereon, and every year thereafter for the sale in like manner of all lands and other property upon which the taxes have not been paid; and the deed of conveyance to the purchaser for all lands and other property thus sold shall be held to vest a good and perfect title in the purchaser thereof, subject to be impeached only for actual fraud; provided, that the former owner shall within two years from date of the filing for record of the Purchaser's Deed have the right to redeem the land on the following basis:

(1) Within the first year of the redemption period upon the payment of the amount of money paid for the land, including One ($1.00) Dollar Tax Deed Recording Fee and all taxes, penalties, interest and costs paid plus not exceeding twenty-five (25%) percent of the aggregate total;

(2) Within the last year of the redemption period upon the payment of the amount of money paid for the land, including One ($1.00) Dollar Tax Deed Recording Fee and all taxes, penalties, interest and costs paid plus not exceeding fifty (50%) percent of the aggregate total. As amended Nov. 8, 1932. (Brought forward in Article 7330, R.S.)

§14. *Assessor and Collector of Taxes.*

Except as provided in Section 16 of this Article, there shall be elected by the qualified voters of each county, an Assessor and Collector of Taxes, who shall hold his office for four years and until his successor is elected and qualified; and such Assessor and Collector of Taxes shall perform all the duties with respect to assessing property for the purpose of taxation and of collecting taxes, as may be prescribed by the Legislature. As amended Nov. 8, 1932; Nov. 2, 1954.

§15. *Lien of Assessment; Seizure and Sale of Property.*

The annual assessment made upon landed property shall be a special lien thereon; and all property, both real and personal, belonging to any delinquent taxpayer shall be liable to seizure and sale for the payment of all the taxes and penalties due by such delinquent; and such property may be sold for the payment of the taxes and penalties

due by such delinquent, under such regulations as the Legislature may provide.

RULES OF CIVIL PROCEDURE

Rule 109. *Citation by Publication*

Where a party to a suit, his agent or attorney, shall make oath that the residence of any party defendant is unknown to affiant (and to such party where the affidavit is made by his agent or attorney) or that such defendant is a transient person, and that after due diligence such party and the affiant have been unable to locate the whereabouts of such defendant, or that such defendant is absent from or is a nonresident of the State, and that the party applying for the citation has attempted to obtain personal service of nonresident notice as provided for in Rule 108, but has been unable to do so, the clerk shall issue citation for such defendant for service by publication. In such cases it shall be the duty of the court trying the case to inquire into the sufficiency of the diligence exercised in attempting to ascertain the residence or whereabouts of the defendant or to obtain service of nonresident notice, as the case may be, before granting any judgment on such service. Provided, however, that where the affidavit shows that the defendant is not within the continental United States, and is not in the Armed Forces of the United States, it shall not be necessary for the party to show that the residence or whereabouts of the defendant is unknown or that an attempt has been made to procure service of nonresident notice. As amended by order of Oct. 10, 1945, effective Feb. 1, 1946.

Rule 117a. *Citation in Suits for Delinquent Ad Valorem Taxes*

(Same was amended under order dated July 17, 1950, to become effective December 1, 1950, only in one particular; namely, that where a record owner had rendered his property within five (5) years before the tax suit, there was a duty to seek personal service of citation.)

(The following comments published in the Texas Bar Journal—where notice normally is given by the Supreme Court of changes in its Rules—were made by the Supreme Court:

> This amendment was written and recommended by the Advisory Committee appointed by the Supreme Court in 1947, to draft a rule providing for the form of citation to be used in delinquent tax suits. The reason for recommending the amendment was that the present rule, in the opinion of the Committee, places an almost impossible burden on attorneys bringing delinquent tax suits of searching old tax records. The amendment limits this required search to five years before the suit is filed. The requirement of an affidavit showing diligent inqury, contained in the first sentence, is retained. 13 T.B.J. 423-424.)

(The language found in Rule 117a, second paragraph as shown in the Appendix to the Petition, dealing with attempted personal service; has been changed to read as follows:

> ". . . and provided further that where any record owner has rendered the property involved within five years before the tax suit is filed, citation on such record owner may not be had by publication or posting unless citation for personal service has been issued

as to such record owner, with a notation thereon setting forth the same address as is contained on the rendition sheet made within such five years, and the sheriff or other person to whom citation has been delivered makes his return thereon that he is unable to locate the defendant."

Article 2041a. *Suits against unknown owners or claimants of interest in land; citation by publication.*

Sec. 1. When land in this State or any interest of any kind in land has been or may hereafter be conveyed, or any lease or contract with reference to land made by written instrument (a) to any person or persons as trustee or trustees and in the conveyance or instrument constituting source of title or claim of title the names of the persons taking or holding the equitable or beneficial title are not disclosed and are unknown, or (b) to any association, joint stock company or partnership, in an association, company or firm name, without disclosing the names of the members, shareholders or partners or persons owning interests in such association, company or firm, and such association, joint stock company or partnership shall thereafter be dissolved and the names of the persons holding or acquiring title to such lands after dissolution are not disclosed in such instrument and are unknown; in each of such cases any person claiming ownership of or any interest in such lands or having a claim or cause of action against such unknown owners or claimants as such. The provisions hereof shall apply to conveyances made to all character and kinds of companies, associations and organizations, and in which conveyance the names and identity of the persons taking and holding the beneficial or equitable title are not disclosed and are un-

known; provided, however, that if the grantee in such conveyance is shown therein to be a corporation or if the grantee be known to be a corporation, in such event this Act shall not apply, but the rights of action shall be governed by Article 2040 of Revised Civil Statutes; but if the character of the organization as whether incorporated or incorporated is not shown in such conveyance and such facts are unknown, then suit brought under the provisions of this Act against the unknown owners or claimants of property under such conveyance shall be sufficient to give the Court jurisdiction over such unknown owners or claimants regardless of whether the named grantee is in fact a corporation or unincorporated. Acts 1931, 42nd Leg., p. 369, ch. 216.

TAX STATUTES

(Tex. Statutes, Volume 20)

Article 7146. *"Real Property"*

Real property for the purpose of taxation, shall be construed to include the land itself, whether laid out in town lots or otherwise, and all buildings, structures and improvements, or other fixtures of whatsoever kind thereon, and all the rights and privileges belonging or in any wise appertaining thereto, and all mines, minerals, quarries and fossils in and under the same. (1876).

Article 7152. *How Rendered*

All property shall be listed or rendered in the manner following:

(1) By the owner. Every person of full age and sound mind, being a resident of this State, shall list all of his real estate, moneys, credits, bonds or stock of joint stock

or other companies (when the property of such company is not assessed in this State), moneys loaned or invested, annuities, franchises, royalties, and all other property.

(2) As agent. He shall also list all lands or other real estate, moneys and other personal property invested, loaned or otherwise controlled by him as agent or attorney, or on account of any other person, company, or corporation, whatsoever, and all moneys deposited subject to his order, check, or drafts and credits due from or owing by any person, body corporate or politic.

* * *

(9) Co-partnership. The property of a firm or company, ~~by a partner~~ or agent thereof. (1909)

Article 7153. *Where Rendered*

All property, real and personal, except such as is required to be listed and assessed otherwise, shall be listed and assessed in the county where it is situated; and all personal property, subject to taxation and temporarily removed from the State or county, shall be listed and assessed in the county of the residence of the owner thereof, or in the county where the principal office of such owner is situated. (1897)

Article 7160. *Listing for Others*

Persons required to list property on behalf of others shall list it in the same manner in which they are required to list their own, but they shall list it separately from their own, specifying in each case the name of the person, estate, company or corporation to whom it belongs. (1876)

Article 7161. *Sworn List*

Each person required by law to list property shall make and sign a statement, verified by his oath, as required by law, of all property, both real and personal, in his possession, or under his control, and which he is required to list for taxation, either as owner or holder thereof, or as guardian, parent, husband, trustee, executor, administrator, receiver, accounting officer, partner, agent or factor. (1876, 1905)

Article 7171. *Assessments in Owner's Name*

All real property subject to taxation shall be assessed to the owners thereof in the manner herein provided; but no assessment of real property shall be considered illegal by reason of the same not being listed or assessed in the name of the owner or owners thereof. (1876)

Article 7172. *Lien for Taxes*

All taxes upon real property shall be a lien upon such property until the same shall have been paid. And should the assessor fail to assess any real estate for any one or more years, the lien shall be good for every year that he should fail to assess for; and he may, *in listing property for taxes any year thereafter, assess all the back taxes due thereon, according to the provisions of this title.* (1876)

Article 7189. *When Assessments Made*

Assessors of taxes shall, between the first day of January and the thirtieth day of April of each year, proceed to take a list of taxable property, real and personal, in his county and assess the value thereof in the manner following, to-wit: By calling upon the person, or by-

calling at the office, place of business or the residence of the person, and listing the property required by law in his name, and requiring such person to make a statement under said oath of such property in the form hereinafter prescribed. (1876)

Article 7193. *Duty in Such Cases*

In all cases of failure to obtain a statement of real and personal property from any cause, the assessor of taxes shall ascertain the amount and value of such property and assess the same as he believes to be the true and full value thereof; and *such assessment shall be as valid and binding as if such property had been rendered by the proper owner thereof.* (1876)

Article 7205. *Assessment of Property Not Rendered*

If the assessor of taxes discovers any real property in his county subject to taxation which has not been listed to him, he shall list and assess such property in the manner following, to-wit:

1. The name of the owner; if unknown, say "unknown." 2. Abstract number and number of certificate. 3. Number of the survey. 4. Name of the original grantee. 5. Number of acres. 6. The true and full value thereof. 7. The number of lot or lots. 8. The number of the block. 9. The true and full value thereof. 10. The name of the city or town, and give such other description of the lot or lots or parcels of land as may be necessary to better describe the same; and such assessment shall be as valid as if rendered by the owner thereof. (1876)

Article 7207. *Assessment of Real Property for Previous Years*

If the assessor of taxes shall discover in his county any real property which has not been assessed or rendered for taxation for any year since 1870, he shall list and assess the same for each year for which it has not been assessed, in the manner prescribed in the preceding article; and such *assessment shall be as valid and binding as though it had been rendered by the owner thereof,* but no such real property shall be assessed by the assessor unless he has ascertained by the certificate of the Comptroller the fact that the records of his office do not show that the property has been rendered or assessed for the year in which he assesses it. (Adopted 1888)

Article 7210. *Assessor to Follow Instructions*

Tax assessors in the execution of their duties shall use the forms and follow the instructions which the Comptroller shall from time to time prescribe, and furnished to them by the county judge in pursuance of law. (1876)

Article 7218. *To Submit Lists to Board*

The Assessor of taxes shall submit all the lists of property rendered to him prior to the first Monday in June to the board of equalization of his county on the first Monday in June or as soon thereafter as practicable, for their inspection, approval, correction or equalization. After said board shall have returned the corrected and approved lists of taxable property, the assessor of taxes shall proceed to assess all the unrendered property of his county as provided for in this title, and shall proceed to make out and prepare his roles or books of all the real and per-

sonal property listed to him, in the form and manner prescribed by the Comptroller. (1876)

We may safely say that a very large part of real estate assessment is thus made by the assessor as unrendered.

(This is the statute under which the tax suit was instituted. A portion of this statute dealing with the question of citation by publication was repealed so far as it conflicted with the Texas Rule of Civil Procedure 117a.)

Article 7345b. *Suits for Delinquent Taxes by Taxing Units*

"Taxing Units" Defined

Section 1. For all purposes of this Act, the term "taxing units," shall include the State of Texas or any town, city or county in said State, or any corporation or district organized under the laws of the State with authority to levy and collect taxas.

Impleading other taxing units having tax claims; service on State and other taxing units; waiver of service; notice of suit

Sec. 2. In any suit hereafter brought by or in behalf of any taxing unit as above defined, for delinquent ad valorem taxes levied against property by any such taxing unit, the plaintiff may implead as parties defendant any or all other taxing units having delinquent ad valorem tax claims against such property, or any part thereof, and it shall be the duty of each defendant taxing unit, upon being served with citation as provided by law to appear in said cause and file its claim for delinquent ad valorem taxes against such property, or any part thereof. It shall be sufficient service upon the State of Texas in any county

in such suit to serve citation upon the County Tax Collector charged with the duty of collecting such delinquent taxes due the State and county against such property and it shall be sufficient service upon any other taxing unit to serve citation upon the officer charged with the duty of collecting the taxes of such taxing unit or upon the Mayor, President, or Chairman or the governing body of such taxing unit, or upon the Secretary of such taxing unit. Any taxing unit having any claim for delinquent ad valorem taxes against such property may waive the issuance and service of citation upon it.

It shall be mandatory upon any such taxing unit so filing such suit or suits, in all cases where all other taxing units are not impleaded to notify all such taxing units not so impleaded of the filing of such suit or suits, such notice to be given by depositing in the United States mail a registered letter addressed to such taxing unit or units giving the name or names of the plaintiff and defendants, the Court where filed, and a short description of the property involved in said suit so that such taxing units not impleaded may have the opportunity to intervene as herein provided.

Parties; issuance and service of process

Sec. 3. The laws governing ordinary foreclosure suits in the District Courts of this State shall control the question of parties, issuance, and service of process and other proceedings in tax suits, save and except as herein otherwise provided. The following special provisions shall apply to and govern the question of parties and issuance and service of process in tax suits:

(a) When the names of the owner or owners of the property against which foreclosure of the tax lien is sought are unknown to the attorney filing the suit for the plaintiff taxing unit, such unknown owner or owners may be made parties and given notice under the designation "unknown owner or owners of the hereinafter described land"; provided, however, that record owners of the property or any interest therein, including record lien holders, shall not be included in the designation of "unknown owners"; and persons within a period of five (5) years next preceding the filing of the suit, shall not be included in the designation of "unknown owners." When the owner of the property is deceased, and the names of the heirs of such former owner are unknown to the attorney filing the suit for the plaintiff taxing unit, such unknown heirs may be made parties and given notice under the designation of "unknown heirs" of such deceased person, subject to the same provisions and restrictions as above set out with reference to making parties under the designation of "unknown owner or owners."

(b) Where any defendant in such suit is a resident of the State of Texas and his residence is known to the attorney filing said suit, process shall issue for service on such defendant and be served and returned as directed by Articles 2021 to 2034, inclusive, of the 1925 Revised Civil Statutes of the State of Texas. Provided, however, that a statement of the nature of the cause of action conforming to the requirement for notices by publication as hereinafter set forth in paragraph (d) below shall be sufficient in such citation, when required.

(c) Where any defendant in such suit is absent from the State or is a nonresident of the State; it shall be suffi-

cient to serve said defendant with notice accompanied by a certified copy of plaintiff's petition as provided in Article 2037 of the 1925 Revised Civil Statutes of the State of Texas, and it shall be sufficient to serve such notice in the manner provided in Article 2038 of the 1925 Revised Civil Statutes of the State of Texas, or in the alternative, service may be had on such defendant by publication as provided in Section 3(d) hereof.

(d) Where any defendant in such suit is a nonresident of the State, where the names of the owner or owners of said property are unknown to the attorney filing the suit for the plaintiff taxing unit, where the residence of any defendant is unknown to such attorney, and where the names of the defendant heirs of any deceased person are unknown to such attorney, and such facts are recited in the petition, service of notice by publication is hereby authorized in each and all of such cases, and all defendants of classes enumerated just above may be joined in one notice; and where service is had by publication, such notice shall be directed to the defendants by name, or by designation as hereinabove provided, and shall be sufficient if they contain the number and style of the case, the names of all parties plaintiff, intervenors and defendants, the Court in which the suit is pending and when to appear and defend the suit, which shall be the first day of the next term of the Court in which the suit is filed; and, as a statement of the nature of the suit, such notices shall show the amount of the taxes alleged to be due each plaintiff and intervenor, exclusive of interest, penalties, and costs, and shall recite that all interest, penalties, and costs allowed by law are included in the suit, a brief general description of the property, and shall also contain, in substance, a recita-

tion that each party to such suit shall take notice of, and plead and answer to, all claims and pleadings then on file or thereafter filed in said cause by all other parties therein. Such notices shall be published in some newspaper published in the county in which the property is located one time a week for two (2) consecutive weeks, the first publication to be not less than fourteen (14) days prior to the first day of the term of Court to which returnable; and the affidavit of the editor or publisher of the newspaper giving the dates of publication, together with a printed copy of the notice as published, attached to such notice, shall constitute sufficient proof of due publication when returned and filed in Court. If there is no newspaper published in the county, then said publication may be made in a newspaper in an adjoining county. A maximum fee of Two and One-half (2½) Cents per line (6 words to count for a line) for each insertion may be taxed for publishing said notice. If the publication of such notice cannot be had for such fee, then service of the notice herein provided may be made by posting a copy at the Courthouse door of the county in which the suit is pending, such notice to be posted at least fourteen (14) days prior to the first day of the term of Court to which it is returnable. When notice is given as herein provided it shall be sufficient, and no other form of citation or notice shall be necessary on such defendants.

(e) Any process authorized by this Act may issue jointly in behalf of all taxing units who are plaintiff and/or intervenors in any suit. After citation and/or notice has been given on behalf of any plaintiff and/or intervenor taxing units, the Court shall have jurisdiction to hear and determine the tax claims of all taxing units who are parties

plaintiff, intervenor or defendant at the time such process is issued; and any taxing unit that has been made a party defendant to such suit may by answer or intervention set up and have determined its tax claims without the necessity of further citation or notice to any parties to such suit.

Pleading and answering to claims filed

Sec. 4. Each party to such suit shall take notice of, and plead and answer to, all claims and pleadings then on file or thereafter filed in said cause by all other parties therein, and the citation upon each defendant shall so recite.

Proof and finding of reasonable and fair value; "adjudged value," defined; burden of proof

Sec. 5. Upon the trial of said cause the Court shall hear evidence upon the reasonable fair value of the property, and shall incorporate in its judgment a finding of the reasonable fair value thereof, in bulk or in parcels, either or both, as the Court may deem proper, which reasonable fair value so found by the Court is hereafter sometimes styled "adjudged value," which "adjudged value" shall be the value as of the date of the trial and shall not necessarily be the value at the time the assessment of the taxes was made; provided, that the burden of proof shall be on the owner or owners of such property in establishing the "fair value" or adjudged value as provided in this section.

Costs and expenses; approval by court

Sec. 6. All court costs, including costs of serving process, in any suit hereafter brought by or in behalf of any taxing units for delinquent taxes in which suits all other taxing units having a delinquent tax claim against such

property of any part thereof, have been impleaded, together with all expenses of foreclosure sale and such reasonable attorney's fees as may be incurred by the interpleaded or intervening taxing units, not exceeding ten per cent (10%) of the amount sued for, such attorney's fee to be subject to the approval of the court together with such reasonable expenses as the taxing units may incur in procuring data and information as to the name, identity and location of necessary parties and in procuring necessary legal descriptions of the property, shall be chargeable as court costs.

Order of sale on foreclosure; sale

Sec. 7. In the case of foreclosure, an order of sale shall issue, and, except as herein otherwise provided, the land shall be sold thereunder as in other cases of foreclosure of tax liens.

Sale for less than adjudged value or aggregate of judgments in suit to party other than taxing unit prohibited; distribution of proceeds

Sec. 8. No property sold for taxes under decree in such suit shall be sold to the owner of said property, directly or indirectly, or to anyone having an interest therein, or to any party other than a taxing unit which is a party to the suit, for less than the amount of the adjudged value aforesaid of said property or the aggregate amount of the judgments against the property in said suit, whichever is lower, and the net proceeds of any sale of such property made under decree of court in said suit to any party other than any such taxing unit shall belong and be distributed to all taxing units which are parties to the suit which by

the judgment in said suit have been found to have tax liens against such property, pro rata and in proportion to the amounts of their respective tax liens as established in said judgment, but any excess in the proceeds of sale over and above the amount necessary to defray the costs of suit and sale and other expenses hereinabove made chargeable against such proceeds, and to fully discharge the judgments against said property, shall be paid to the parties legally entitled to such excess.

Purchasing taxing unit to hold property for itself and other taxing units adjudged to have liens; sale by purchasing taxing unit; proceeds; failure to sell within six months after redemption period expires

Sec. 9. If the property be sold to any taxing unit which is a party to the judgment under decree of Court in said suit, the title to said property shall be bid in and held by the taxing unit purchasing same for the use and benefit of itself and all other taxing units which are parties to the suit and which have been adjudged in said suit to have tax liens against such property, pro rata and in proportion to the amount of the tax liens in favor of said respective taxing units as established by the judgment in said suit, and costs and expenses shall not be payable until sale by such taxing unit so purchasing same. The taxing unit may sell and convey said property so purchased by it, or which has heretofore been purchased in the name of any officer thereof, at any time in any manner determined to be most advantageous to said taxing unit or units, either at public or private sale, subject to any then existing right of redemption; and the purchaser of the property at any such sale shall receive all of the right, title and

interest in said property as was acquired and is then held by said taxing unit under such tax foreclosure sale to it; but such property shall not be sold by the taxing unit purchasing the same, at private sale, for less than the adjudged value thereof, if any, as established in the tax judgment; or the total amount for which such judgment was rendered against the property in said suit, whichever is lower, without the written consent of all taxing units which in said judgment shall have been found to have tax liens against said property. All such consents shall be evidenced by the joinder in the conveyance by the consenting taxing units, acting by the officers herein authorized to give such consents. Consent to such sales in behalf of the State of Texas may be given by the County Tax Collector of the county in which the property is located; and consents on behalf of other taxing units may be given by the presiding officers of their governing bodies. Deeds executed hereunder by taxing units shall be executed in their behalf by the presiding officer of their governing body and whose authority to so act in any given case shall be prima facie presumed. When such property is so sold at public or private sale, the proceeds thereof shall be received by or paid over to the taxing unit which purchased said property at the tax foreclosure sale, for the account of itself and all other taxing units adjudged to have a tax lien against such property, and all taxing units so receiving said proceeds shall first pay out of the same all costs and expenses of Court and of sale, and distribute the remainder among all taxing units for which purchasing taxing unit purchased and held said property, pro rata and in proportion to the amounts of their tax liens against said property as established in said judgment. Public sales hereinabove provided for may either be made by the Sheriff, at the request of

the taxing unit purchasing the property at the tax foreclosure sale, or by any Commissioner appointed by such taxing unit by resolution of its governing body. If the State of Texas is the taxing unit which purchased said property at the tax foreclosure sale, the Commissioners Court of the county in which the property is located shall have authority to act for the State of Texas in making private sales and conveyances of said property, as herein provided, or in requesting the Sheriff, or in appointing a Commissioner, to make public sale thereof, and in receiving and distributing the proceeds of such sales; and all sales and conveyances made in behalf of the State of Texas by the Commissioners Court, or made by the Sheriff or any Commissioner appointed by the Commissioners Court, under the provisions hereof, shall operate to transfer to the purchaser at such sale all right, title and interest acquired or held by the State of Texas as purchaser at the tax foreclosure sale. Any taxing unit, Sheriff, or Commissioner appointed by a taxing unit, making any sale under provisions hereof shall execute and deliver to the purchaser at such sale a deed of conveyance, conveying all right, title and interest of all the taxing units interested in the tax foreclosure judgment in and to the property so sold; provided, if the period for the redemption of said property from said tax foreclosure sale has not expired at the time of said sale, said conveyance shall be made expressly subject to the right of redemption provided in Section 12 of said Act.

Provided, however, that the methods of sale above set out shall not be exclusive and that if sale has not been made by, or at the instance of, the purchasing taxing unit within six (6) months after the redemption period has expired, any taxing unit which has obtained judgment in

said suit may force the sale of said property by the Sheriff by written request to the Sheriff, and in the event such written request is so made to the Sheriff it shall be his duty to sell said property at public sale as hereinafter provided. All public sales provided for in this Section shall be made in the manner prescribed for the sale of real estate under execution. The notice of the sale shall contain a legal description of the property to be sold, the number and style of the suit under which same was sold at tax foreclosure sale and the date of said tax foreclosure sale; and the Sheriff or other officer making such sale is hereby authorized, and it is hereby made his duty, to reject any and all bids for said land when in his judgment the amount bid is insufficient or inadequate, and in the event said bid or bids are rejected, the land shall be readvertised and offered for sale as herein provided; but the acceptance by the Sheriff or other officer authorized to make such sale of a bid for said land shall be conclusive and binding on the question of the sufficiency of the bid, and no action shall be sustained in any Court of this State to set aside said sale on the grounds of the inadequacy of the amount bid and accepted. Nothing herein shall be construed as prohibiting any taxing unit participating in said judgment from instituting action to set aside the said sale on the grounds of fraud or collusion between the officer making the sale and the purchaser, provided that such action be brought within two (2) years after such sale is made, and not afterward. The Sheriff or other officer making any such sale shall receive and pay over the proceeds thereof as hereinabove provided, and the same shall be distributed as herein provided.

All sales and conveyances heretofore made by taxing units, or officers thereof, of property purchased by them, or in the name of any officer thereof, of property purchased by them, or in the name of any officer thereof, at tax foreclosure sales, for the benefit of themselves and all other taxing units interested in the tax judgment, and all sales heretofore made by the Commissioners Courts, or the Attorney General joined by the County Tax Collector, of property purchased by the State of Texas at tax foreclosure sales for the benefit of itself and other taxing units, are hereby in all things confirmed and validated; provided that this validating provision shall in no way apply to or validate any such sale the validity of which is challenged in any now pending litigation; nor shall the same apply to or validate any such sale, in cases where the Sheriff upon written request of any taxing unit, has thereafter made sale of the same property at public outcry and all such so made by the Sheriff as provided in Section 9 of said Act prior to the taking effect of this Amendment, and all such sales so made by the Sheriff are hereby in all things confirmed and validated.

No action attacking the validity of any resale of property purchased by a taxing unit at a tax foreclosure sale, or any of said sale hereafter made in accordance with, or purporting to be made in accordance with, this Section shall be commenced after the expiration of one (1) year from the date of such sale.

Title of Purchaser

Sec. 10. The purchaser of property sold for taxes in such foreclosure suit shall take title free and clear of all liens and claims for ad valorem taxes against such property

delinquent at the time of judgment in said suit to any taxing unit which was a party to said suit, or which had been served with citation in said suit as required by this Act. Provided, the term "all liens and claims for ad valorem taxes" shall never be construed to include assessments for maintenance and operation purposes on a pro rata per acre basis against irrigable lands authorized by law to be made by water improvement districts, or water control and improvement districts, and no judgment foreclosing such lines and claims for ad valorem taxes shall ever prejudice the collection of said assessments or the liens securing same.

Suits entitled to Precedence

Sec. 11. Suits for delinquent taxes shall have precedence and priority in the District Court of this State, and in the Appellate Courts thereof.

Judgment; redemption, right to

Sec. 12. In all suits heretofore or hereafter filed to collect delinquent taxes against property, judgment in said suit shall provide for the issuance of writ of possession within twenty (20) days after the period of redemption shall have expired to the purchaser at foreclosure sale or its or his assigns; but whenever land is sold under judgment in such suit for taxes, the owner of such property, or anyone having an interest therein, or their heirs, assigns or legal representatives, may, within two (2) years from the date of the filing for record of the purchaser's deed and not thereafter, have the right to redeem said property from such purchaser on the following basis, to-wit:

(1) Within the first year of the redemption period, upon the payment of the amount of the bid for the property by the purchaser at such sale, including a One Dollar ($1) tax deed recording fee and all taxes, penalties, interest and costs thereafter paid thereon, plus twenty-five per cent (25%) of the aggregate total.

(2) Within the last year of the redemption period, upon the payment of the amount bid for the property at such sale, including a One Dollar ($1) tax deed recording fee and all taxes, penalties, interest and costs thereafter paid thereon, plus fifty per cent (50%) of the aggregate total; and no further or additional amount than herein specified shall be required to be paid to effect any such redemption.

In addition to redeeming direct from the purchaser, as aforesaid, redemption may also be made upon the basis hereinabove defined as provided in Articles 7284 and 7285, of the Revised Civil Statutes of Texas of 1925. The term "purchaser" as used in this Section shall include any taxing unit purchasing property at tax foreclosure sale.

Distribution of redemption money

Sec. 12-a. In all cases in which property has been redeemed from a taxing unit, as provided in Section 12 of this Act, while said property is still held by such taxing unit, the taxing unit to whom the redemption money is paid shall distribute and apply said money in the same manner as provided in Section 9 of this Act for the application and distribution of the proceeds of the resale of land; but if the land so redeemed from a taxing unit has been resold during the period of redemption, the redemption money shall be distributed pro tanto by the taxing unit receiving the same, as follows:

(a) If the redemption occurs within one (1) year after the date of the resale of said land, the purchaser at such resale shall receive, out of the redemption money, the amount paid by him for the property at such resale, plus twenty-five per cent (25%) of such amount; or

(b) If said redemption occurs more than one (1) year after the resale of such land, the purchaser at such resale shall receive, out of the redemption money, the amount paid by him for the property at such resale, plus fifty per cent (50%) of such amount; and

(c) The remainder of such redemption money, if any, after payment to the purchaser at the resale as herein provided shall be distributed, pro rata, to the taxing units adjudged in the tax foreclosure judgment to have a tax lien against the property, in the proportions of the amounts for which such liens were established.

Provisions of Act cumulative; effect of conflict with other acts

Sec. 13. The provisions of this Act shall be cumulative of and in addition to all other rights and remedies to which any taxing unit may be entitled, but as to any proceeding brought under this Act, if any part or portion of this Act be in conflict with any part or portion of any law of the State, the terms and provisions of this Act shall govern as to such proceeding. The provisions of Chapter 10, Title 122 of the Revised Civil Statutes of 1925 shall govern suits brought under this Act except as herein provided.

Partition of lands involved in tax suits

Sec. 15. Where suits are filed for delinquent taxes under the provisions of this Act, and the land is owned undivided

by two (2) or more persons, any one or more persons owning an undivided interest in such land, may have the same partitioned as now provided by law for the partition of real estate by the district Courts of this State. When said land has been partitioned and set aside in severalty to the respective owners thereof, the taxes, penalties, interest, and costs shall be apportioned and taxed against the respective owners thereof in proportion to their respective interests in the whole, and upon the payment of taxes, penalties, interest, and costs so apportioned and taxed against such owner, and the land so set aside and partitioned to such owner in severalty, the same shall constitute full and final payment of all taxes, penalties, interest, and costs owing by such owner involved in such suit, and the land so partitioned shall thereafter be free from any further claim or lien for the taxes involved in said suit against said owner.

Provided, however, any owner or owners of a portion thereof so set aside and apportioned to him in such partition proceeding as herein provided shall or refuse to pay the taxes, penalties, interest, and costs taxed and apportioned against him and his interest, such suit shall proceed to a conclusion in accordance with all other provisions of this Act as to such owner and land, and the Court shall render judgment accordingly, omitting from said judgment such owner or owners and the land apportioned to such owner or owners in said partition proceeding as the taxes, penalties, interest, and costs have been paid as herein provided.

In addition to the fees now allowed by law to the county, district, or other attorney authorized by law to represent the State and county in suits provided by this Act for delinquent taxes, the judgment of the district Court trying the case shall allow such attorney an additional fee for

services occasioned by a partition of said land, where a partition is sought, a sum not to exceed Five Dollars ($5) per acre for each separate tract so partitioned, the same to be taxed as part of the costs against the respective owners in proportion to their interest in the whole, the same to constitute a lien against said land until paid, and when paid shall be paid over by the tax collector to the county, district, or other attorney entitled under the law to receive the same.

"Owner" as herein used shall mean any person, male or female, firm or corporation owning an interest in said land.

July 2, 1949

Mr. Fred L. Doud
1381 Marshall Street
St. Paul, Minnesota

Dear Mr. Doud:

Re: Stovall and Appling Fee,
Land File #39, 640 Ac.,
Being Sec. #35, Koch Subdv.,
Jackson County, Texas

Mr. P. C. Owen of El Campo, who called on you at our (suggestion), suggests that we write or advise with you with reference to a mineral reservation in above land many years ago, now in name of Mineral Holding Trust according to the records of Jackson County, Texas, where the land in question is located. Said mineral reservation contained a deed from Grant Van Zant to A. E. Johns et al. March 5th, 1920; Mr. Grant Van Zandt subsequently quit claiming same to Mineral Holding Trust. Neither Van

Zant nor Mineral Holding Trust having ever paid any taxes thereon.

Mr. Appling and I desire to get this cloud on our land title removed by quit claim deed or deeds, and we are willing to pay $500.00 cash for quit claims from whoever owns or has legal right to make us such quit claim deeds. We would very much desire this method than by legal procedure, and would like to clear our title while we are living,—we are getting along in years,—I am 68.

Mr. Owen speaks of you in the highest terms and recommends that we made arrangements with you to handle the securing of quit claims from the proper parties; if you will kindly accept the employment we are willing to pay you $150.00 service fee and your incidental expenses, for securing and delivering to us the quit claims together with proof by Affidavits (or other authentic proof) that the ones making the quit claims are the owners of the Mineral Holding Trust. Mr. Owen says he thinks a Mrs. Concklin is one of the main owners in said Trust, but he is not at all clear as to who or how many are in the Trust but thinks you will be able to acquire this information.

Our attorney is Mr. D. M. Duson of El Campo, Texas, to whom we are mailing a copy of this letter, and needless to say that both Mr. Duson and I will fully cooperate with you in every way possible incidental to handling the matter successfully. On receipt of a letter from you that you will undertake to handle this matter for us we will mail you $50.00 check for retainer and expenses. We think it might be a good idea to secure the original authentic copy of instrument creating the Mineral Hold-

ing Trust, as both Mr. Duson and I are completely in the dark on this point.

Awaiting reply; remain, Very truly yours,

signed Guy F. Stovall

HGD c/cy to Mr. Duson

CONSTITUTION AND STATUTES DEALING WITH RIGHT OF PURCHASER TO RELY UPON JUDGMENT

Art. 3323. 3245, 1879, 1826 *Valid title through executor*

When an executor or administrator, legally qualified as such has performed any acts as such executor or administrator in conformity with his authority and law, such acts shall continue to be valid to all intents and purposes, so far as regards the rights of innocent purchasers of any of the property of the estate from such executor or administrator, for a valuable consideration, in good faith, and without notice of any illegality in the title to the same, notwithstanding such acts or the authority under which they were performed may afterward be set aside, annulled and declared invalid.

Art. 3818. 3768, 2378, 2318 *Purchaser deemed innocent*

A purchaser at a sale under execution shall be deemed to be an innocent purchaser without notice in all cases where he would be deemed to be such had the sale been made voluntarily by the defendant in person.

Article 7330, dealing with tax judgments, is found in the Petition, p. 45.

The constitutional provision, Article VIII, Sec. 13, is found at page 25 of the Reply Appendix.